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GENE A. MAYHALL, d/b/a NATIONAL POOLS OF PALOS, Plaintiff-Appellant, vs. SEAN McDONNELL, Defendant-Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Honorable John Thornton, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment n.o.v. which reduced a jury award from $1115.68 to $519.42 after the trial of a breach of contract action.

In early July 1967, Sean McDonnell, the defendant, contracted with National Pools of Palos (hereafter National Pools) for repair work on his swimming pool. The contract specified an hourly labor rate of $9.00. National Pools then assigned two employees to work on the McDonnell pool and these employees worked on a part-time basis over a two week period until the job was completed. National Pools subsequently sent McDonnell a bill for $1115.68 which included a charge of $774.00 for eighty-six hours labor. McDonnell, however, disputed the validity of the amount shown on the bill and refused to pay it. National Pools then sued for the damages resulting from McDonnell's alleged breach of contract. In his answer to the complaint filed against him, McDonnell denied that National Pools' employees had worked the number of hours specified on the bill and further denied that the itemization for materials was correct. McDonnell also denied that National Pools had fully performed its contractual agreement to repair his pool. Thus, the issues to be tried were well defined.

At trial, Sean McDonnell was called as an adverse witness. McDonnell testified that he had contracted with National

Pools for certain repair work on his pool and, when shown an itemized list of materials and parts which National Pools had allegedly installed on his pool, indicated that the list appeared to be correct. McDonnell also testified that two of National Pools' employees had worked on a part-time basis over a two week period, but he was unable to indicate the number of hours they had actually worked because he had no firsthand knowledge of that fact. McDonnell was then shown a copy of the bill sent by National Pools and was asked if he had ever received this bill. McDonnell suggested that he had no recollection of the bill but it "might have been."

Gene Mayhall, the plaintiff, testified that he was the owner of National Pools and was in charge of all employees. Pursuant to his contract with McDonnell to repair the latter's pool, he assigned two part-time employees, Don Knoer and "Dave," to complete the job. He testified that these employees were paid regular wages during the two week period in which they worked on the McDonnell Pool. He indicated that he maintained time records and books of account for all work performed for his customers and that his invoices were prepared from his time records. He stated, however, that he was unable to locate his time records for the work performed on the McDonnell pool because the records were "somewhere in storage." Mayhall then identified a copy of the bill for $1115.68 as a true and exact reproduction of the one he had sent to McDonnell. This bill was then admitted into evidence, but only for the limited purpose of showing that a bill was sent to McDonnell and not as evidence of the labor and materials charges indicated on the face of the bill.

Don Knoer, a former employee of National Pools, testified that he had performed work on the McDonnell pool for about two weeks in 1967 on a part-time basis. He also indicated that

"Dave" had done some work on the pool. Knoer was unable, however, to specify the exact number of hours he had worked on the pool.

The plaintiff then rested his case and defendant's motion for a directed verdict was denied.

Sean McDonnell, testifying in defense, gave substantially the same testimony which he had given earlier but added that the work done on his pool by National Pools was not of good, workmanlike quality.

McDonnell's wife testified concerning certain mechanical problems which developed in the pool's motor and filtration system after National Pools had completed the repair work on the pool. She stated that National Pools' employees had worked on the pool over a two week period but she had no recollection as to the days they were present or the number of hours they had worked.

Evon Morgan, the owner of Elms Swimming Pool Service, testified as an expert witness for the defense. Morgan indicated that he had performed work on the McDonnell pool shortly after National Pools had completed its repair work. According to Morgan, certain work done by National Pools had been improperly performed. Morgan also expressed his expert opinion that the work performed by National Pools on the McDonnell pool should have taken no more than twenty-four hours.

After the defense rested, Gene Mayhall and Don Knoer appeared as rebuttal witnesses and testified that the work done on the McDonnell pool was performed in good, workmanlike fashion.

The six-man jury then returned a verdict for National Pools in the amount of $1115.68. Subsequently, McDonnell introduced a post-trial motion for judgment n.o.v. and alleged, in support thereof, that the only evidence adduced at trial concerning

the number of hours actually consumed during the repair work on the pool was given by Evón Morgan, i.e., twenty-four hours. Thus, McDonnell's motion asserted, the jury verdict was contrary to both the law and the evidence because it represented an amount in excess of the damages proven by National Pools during the trial.

The trial judge entered judgment n.o.v. in the amount of $519.42 which represented a stipulated materials cost of $303.42 plus $216.00 for labor (24 hours at $9.00 per hour).

On appeal, National Pools contends that the trial judge erred first by modifying the jury verdict and second by allowing Evon Morgan to testify as an expert witness. We can find no merit in either of these contentions.

A motion for judgment notwithstanding verdict should be allowed only if there is a complete absence of probative facts to support the conclusion drawn by the jury. Rodgers v. Meyers & Smith, Inc., 57 Ill. App. 2d 200, 206 N.E. 2d 845 (1965). In the instant case, the jury's verdict obviously indicated the jury had found that eighty-six hours of labor had been expended by National Pools' employees in the repair work on McDonnell's pool. This verdict was clearly erroneous, however, because National Pools did not introduce one iota of evidence concerning the number of hours worked. The invoice, which was introduced into evidence by National Pools, did show eighty-six hours of work, but that invoice was allowed for a limited purpose only and could not be viewed as evidence of the number of hours worked. The only evidence which bore on the hours worked issue was given by Evon Morgan and he testified that no more than twenty-four hours should have been required for the work. The proof in an action for damages for breach of contract must establish the fact that damages were sustained and a reasonable basis for their

computation. 15 I.L.P. Damages § 246. In this case the hourly rate was known but it was incumbent upon National Pools to establish that a certain number of hours were actually worked. Had National Pools introduced its time records or had its witnesses been able to offer testimony concerning the number of hours worked, it would perhaps have met its burden of proof. Because National Pools failed in this regard, however, the trial judge was entirely correct in entering a judgment n.o.v. which was based only on the evidence adduced at trial.

With respect to National Pools' second contention, it is well established that a trial judge has wide discretion in determining whether an expert should be allowed to testify. The trial judge's determination in this regard necessarily involves questions of relevance, materiality and competence, and such matters are best left for resolution by the trial judge where there is no abuse of his discretion. See 18 I.L.P. Evidence §321-3. We find no such abuse in this case.

We need consider only one additional question in this case. The appellee has asked that we assess costs against National Pools pursuant to the provisions of Ill. Rev. Stat. (1967), ch. 33, § 23. We are unable to say, however, that National Pools has prosecuted this appeal for purposes of delay. The appellee's request for costs is, therefore, denied.

For the reasons given, the judgment of the trial court is affirmed.

AFFIRMED.

BURKE, P.J. and GOLDBERG, J., concur.

54295

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

JOHN DURLEY,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Hon. Philip Romiti, Presiding.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

Defendant, John Durley, was indicted for unlawful sale of narcotic drugs. C 38, §22-3. He was tried with a codefendant, Evie Mae Carter, who was acquitted of sale of narcotics but found guilty of possession. After a bench trial, Durley was found guilty and sentenced to a term of ten to fifteen years.

Defendant contends that: 1) the trial judge denied his Sixth Amendment right to confront witnesses by restricting cross-examination on the informer's place of employment; 2) the trial court erred in accepting the jury waiver since the record does not show that the waiver was knowingly and intelligently made; 3) the State failed to prove the defendant guilty beyond a reasonable doubt since the informer's testimony was not sufficiently corroborated; 4) the trial court erred in denying defendant's motion to suppress physical evidence.

At the hearing on the motion to suppress, Detective Thomas King testified that, on September 15, 1966, Robert Miller, sometimes referred to as Fred Washington, told him that John Durley was a narcotics runner for a heavy-set woman in a basement apartment on Monroe Street. Later that evening, the police made a thorough search of the informer and gave him $20 in prerecorded funds along with a walkie-talkie device to signal them when the purchase had been made.

Detective King stationed a squad car on Leavitt Street north of Madison Street, in the area. He drove the informer,

Miller, to a point east of Leavitt on Monroe Street, one block south. Miller then walked to Leavitt Street and turned north out of Detective King's view. Approximately two minutes later, Miller returned in the company of the defendant. The two men proceeded to walk west on Monroe Street. They stopped and Detective King lost sight of the defendant as he walked towards a building. The defendant reappeared a minute later and the two men began walking west on Monroe. At that point, Detective King received a signal on the walkie-talkie device. Defendant was arrested but the prerecorded funds were not found in his possession. The informer had possession of a silver foil package of heroin. The informer told Detective King that Durley had entered a basement apartment on Monroe Street. The address of the building was determined to be 2208 West Monroe Street. Detective King and other officers entered the vestibule of the building. They gained entry into Evie Mae Carter's basement apartment by forcing open two doors. The officers had no search warrant. Evie Mae Carter was placed under arrest and searched. Some narcotics were found on her person. A search of a dresser in the apartment revealed $810.00 including the prerecorded money. Detective King also testified that he had received valuable information from the informer, Robert Miller, on fifteen to twenty prior occasions, all leading to narcotics arrests and prosecutions.

The trial court denied the motion to suppress. The defendants were tried together and the same attorney represented both. At the trial, the testimony of the informer agreed generally with that given by Detective King at the hearing on the motion to suppress. The testimony of Detective King at trial corroborated that of the informer and did not vary significantly from that given at the hearing on the motion.

Defendant, in support of his first contention regarding cross-examination of the informer, relies primarily upon Smith v. Illinois, 390 U S 129. In that case, the United States

Supreme Court reversed a conviction because defense counsel was not permitted to ask an informer on cross-examination, his real name and address. The court found that this restriction constituted a denial of defendant's rights under the Sixth Amendment. Mr. Justice Stewart, writing for the court, considered those questions to be most significant and ". . .the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination. . . . To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." 390 U S 129 at page 131. Mr. Justice Stewart went on, however, to reaffirm the general proposition stated in Alford v. United States, 282 U S 687 that "the extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted." 390 U S 129 at page 132.

Relying upon the decision in Smith, this court, in People v. Shaw, 117 Ill App 2d 16, reversed a conviction for the sale of narcotics because defendant was prevented on cross-examination from questioning an informer with regard to his places of residence and employment. The court found Smith to be applicable to the facts before it because, as in Smith, the questions were necessary to place the witness in the proper setting and "did not involve self-incrimination, nor did they harass, annoy or humiliate the witness." 117 Ill App 2d 16 at page 19. The court went on to indicate that Smith does not require automatic reversal in all cases failing to meet the Alford criteria but depends upon the factual circumstances of each case. 117 Ill App 2d 16 at page 20.

In People v. Hall, 117 Ill App 2d 116, a conviction for the sale of narcotics was reversed because defendant was not permitted to inquire as to the informer's place of residence. Similarly in People v. Dunams, 118 Ill App 2d 76, a conviction for the sale of narcotics was set aside on the basis that

defendant was not permitted to ask the informer his home address.

Following these decisions, we must determine whether the rights of the defendant under the Sixth Amendment were violated by denial of effective cross-examination of the informer. The trial court sustained objections to questions regarding the then present place of employment and the name of the psychoanalyst of the informer. During the lengthy questioning of the informer, it was established that he had been employed as a paid informant with the Chicago Police Department in the past; that he used numerous aliases in his work; that he had known Officers King and Kelly for approximately three years; that he served time for various offenses including narcotics violations; that he had been paid for his services leading up to defendant's arrest; that he had taken narcotics orally and by injection; that he had received medical treatment on prior occasions for narcotics addiction; and that he was presently seeing a psychoanalyst. Further, during cross-examination, the defense attorney was permitted to inspect the witness' arm, to question the witness concerning certain marks found on his arm and to point these marks out to the trial court. Indeed, the able assault upon the credibility of the witness, mounted here by counsel for defendant demonstrates an intensive and comprehensive cross-examination which served as an effective test of his credibility.

In United States v. Teller, 412 F 2d 374 (7th Cir 1969), this same issue was raised in a narcotics case. The court, in finding no Sixth Amendment violation and affirming the conviction, stated:

> "Smith does not per se require a new trial merely because the district court sustained an objection to a question seeking to elicit Washington's [the informer's] address. Smith requires reversal only where the lack of a witness's [sic] name and address denies a defendant an opportunity to effectively cross-examine a witness." 412 F 2d 374 at page 380.

Thereafter, in United States v. Lawler, 413 F 2d 622 (7th Cir 1969), the defendant raised a point on refusal of the trial court to permit inquiry as to where the informer was employed; precisely as in the case at bar. In affirming the conviction, the court determined that the intensive cross-examination of the informer and the fact that much of the incriminating evidence was provided by narcotics agents were factors which indicated that the defendant suffered no prejudicial denial of the right to confrontation and effective cross-examination. 413 F 2d 622 at page 627. Similarly, in United States v. Lee, 413 F 2d 910 (7th Cir 1969) the court found no violation of Smith where the trial court sustained objections to cross-examination concerning the informant's place of residence. The court determined that, since the defendant was actually accorded an ample opportunity to cross-examine the witness, there was no violation of Sixth Amendment rights of confrontation.

In the instant case, as we have seen, defense counsel was permitted lengthy cross-examination of the informer; similar to that upheld as sufficient in Teller, Lawler and Lee. Further, there was corroboration of the informer's testimony by Detective King who appeared as a witness at both the hearing on the motion to suppress and at the trial. The record here patently demonstrates that defendant had fair and adequate opportunity for effective cross-examination. His right to confrontation under the Sixth Amendment was not denied.

Defendant's second contention is that his conviction should be reversed because he did not knowingly and intelligently waive his right to a jury trial. Defendant argues that his silence during the trial court's inquiry as to whether or not he waived jury trial cannot be interpreted as an affirmative and intelligent waiver. We find this contention without merit. The record indicates that defendant's privately retained counsel, in his presence, and without objection on his part, expressly advised the court that defendant wished to waive trial by jury. The

court then proceeded to advise defendant that he had a right to a jury trial and explained to him the elements of such a trial. The trial court concluded by stating:

> "Now, knowing of your right to trial by jury do you still wish to waive your right to be tried by a jury? You may indicate that for the record by signing the jury waiver which your attorney is going to hand to you and explain to you. And you will sign that for the record."

Defendant did not respond to the questions of the court but stood mute. The defense attorney then tendered jury waivers signed by each of the defendants.

There is no invariable or precise formula for determining whether a waiver of jury trial has been understandingly made. The issue depends upon the particular facts of each individual case. People v. Diesel, 128 Ill App 2d 388; People v. Luckey, 126 Ill App 2d 15, 18. The mere fact that defendant made no verbal response to the questions put by the court is not determinative. However, our courts have repeatedly held that a defendant who permits his own attorney, in his presence in open court and without objection, to waive his right to a jury trial is deemed to have acquiesced and is bound by this action. People v. Sailor, 43 Ill 2d 256, 260; People v. Novotny, 41 Ill 2d 401, 409; People v. Guyton, 114 Ill App 2d 394, 402 and People v. Sykes, 110 Ill App 2d 91, 93. We must reject authorities cited by defendant such as People v. Bell, 104 Ill App 2d 479 where no attempt was made by the court to explain to defendant his right to trial by jury and the significance of the waiver. In the case at bar, we find that the waiver of jury trial was knowingly, intelligently and properly made.

Defendant next maintains that the State failed to prove him guilty beyond a reasonable doubt since the addict-informer's testimony was not sufficiently corroborated. We are dealing here with the problem of the credibility of the informer testifying as a witness for the State. Where there is no jury, as in the instant case, it is the duty of the trial court to determine the credibility of the witness and the weight to be

accorded his testimony. People v. Henson, 29 Ill 2d 210, 213; People v. Perkins, 26 Ill 2d 230, 235; People v. Banks, 116 Ill App 2d 147, 155. The finding of the trial court must stand unless the proof is so unsatisfactory as to justify a reasonable doubt of defendant's guilt. People v. Henson, 29 Ill 2d 210, 213; People v. Perkins, 26 Ill 2d 230, 234; People v. Barney, 15 Ill 2d 503, 507; People v. Armstrong, 127 Ill App 2d 377, 381; People v. Anthony, 117 Ill App 2d 46, 50. However, when the witness is a narcotics addict and police informer, his testimony must be carefully and closely examined; and, generally, corroboration is required to find the defendant guilty. People v. Norman, 28 Ill 2d 77, 82; People v. Perkins, 26 Ill 2d 230, 234; and People v. Ramirez, 124 Ill App 2d 407, 413.

In the case at bar, the trial court saw and heard the informer testify. His responses to questions during cross-examination, were certainly scrutinized with caution by the careful trial judge. In addition, while the informer was the only witness to the actual transaction, substantial corroboration of the sale was provided by the testimony of Detective King. Such corroboration by a police officer of an addict-informer's testimony has repeatedly been held sufficient to satisfy the requirement that defendant be proven guilty beyond a reasonable doubt. People v. Adams, 46 Ill 2d 200, 208; People v. Realmo, 28 Ill 2d 510, 513; People v. Norman, 26 Ill 2d 77, 82; People v. Perkins, 26 Ill 2d 230, 234; People v. Phillips, 126 Ill App 2d 179, 187; and People v. Ramirez, 124 Ill App 2d 407, 413.

Defendant further argues that the discrepancies in Detective King's testimony should destroy his credibility as a corroborating witness. Defendant points to the inconsistency between King's testimony at trial that he received a telephone call from the informant at 6:00 p.m. and his testimony at the hearing on the motion to suppress that the telephone call came at 9:30 p.m. Additionally, defendant notes that Detective King at the hearing on the motion to suppress stated he gave the informer $20 in prerecorded funds, while at trial King testified that he gave the informer only $19.

Minor discrepancies such as those urged by the defendant do not as a matter of law destroy the credibility of a witness but go only to the weight to be given to his testimony. People v. Clay, 27 Ill 2d 27, 32; People v. Ramirez, 124 Ill App 2d 407, 413; People v. Banks, 116 Ill App 2d 147, 154; and People v. Smith, 102 Ill App 2d 134, 142. Arguments of this type are equivalent to Indian scouts operating on the flanks of a large body of cavalry. They are merely peripheral and do not reach the main issue of reasonable doubt. Upon the entire record, the evidence is amply sufficient to prove guilt of defendant beyond a reasonable doubt. We see no reason to disturb the findings of the trial court in this instance. People v. Adams, 46 Ill 2d 200, 208; People v. Realmo, 28 Ill 2d 510, 513; People v. Ramirez, 124 Ill App 2d 407, 414; and People v. Robinson, 105 Ill App 2d 57, 64.

Defendant's final contention is that the trial court erred in denying the motion to suppress evidence seized as a result of the search of Evie Mae Carter's apartment. Defendant maintains that since the arrest of Carter was illegal the police had no authority to search her apartment. Further, defendant argues, the police officers, based upon the information they possessed, could not have obtained either an arrest or search warrant. Finally, defendant maintains that the motion to suppress should have been sustained since the search of Carter's apartment went beyond the limits set forth in Chimel v. California, 395 U S 752.

Before discussing defendant's arguments, we must first consider the State's contention that the defendant has no standing to object to the admission of the evidence obtained in the search of Carter's apartment. The State maintains that the Fourth Amendment right to be free from unreasonable search and seizure is personal and the defendant cannot object to the seizure of property from another, no matter how improper the search and seizure might be. The State depends upon People v. Pitts, 26 Ill 2d 395, 399.

After Pitts, the Supreme Court reconsidered this question in People v. DeFillipis, 34 Ill 2d 129. Adhering to Jones v. United States, 362 U S 257, the court in DeFillipis stated (34 Ill 2d at page 135):

> ". . .we see in the logic of that decision a requirement that the conventional concepts of standing must give way whenever it is necessary to prevent unfairness, and to secure to an accused both his constitutional protection against unlawful search and seizure and his protection against self-incrimination."

The court held that the accused could raise the point because his possession of the items in question could have been a basis for conviction.

Based upon the decision in DeFillipis and subsequent cases, we hold that the defendant, Durley, does have standing to argue that the evidence was illegally seized and improperly admitted against him at trial. People v. Rowland, 36 Ill 2d 311, 312; People v. DeFillipis, 34 Ill 2d 129, 137; People v. Garrett, 115 Ill App 2d 333, 339; and People v. Vaglica, 99 Ill App 2d 194, 198.

Considering the merits of defendant's contentions, we must first determine whether the police officers had reasonable grounds to arrest Evie Mae Carter. If they did have reasonable grounds to make an arrest, a search incident to that arrest would be proper. People v. Wright, 42 Ill 2d 457, 459; People v. Bambulas, 42 Ill 2d 419, 423; People v. Ramirez, 124 Ill App 2d 407, 411; People v. Bridges, 123 Ill App 2d 58, 68. Looking at the facts in the instant case, it is apparent that Detective King had reasonable grounds, provided by the informer and based upon his personal observations, to believe that a crime had occurred in Evie Mae Carter's apartment and that the occupant had been a participant in this crime.

It has been held that reasonable grounds for an arrest may be furnished by an informer whose reliability has been previously established or is independently corroborated. Draper v. United States, 358 U S 307, 312; People v. Wright, 42 Ill 2d 457, 459;

People v. Truelock, 35 Ill 2d 189, 191; People v. Robinson, 105 Ill App 2d 57, 64; and People v. Clifton, 98 Ill App 2d 383, 386. Here, the informer had given information which formed the basis for approximately fifteen or twenty arrests and prosecutions and a number of convictions. Such evidence has been held to establish the informer's reliability. People v. Wright, 42 Ill 2d 457, 459; People v. Truelock, 35 Ill 2d 189, 191; People v. McCray, 33 Ill 2d 66, 70; People v. Robinson, 105 Ill App 2d 57, 64; and People v. Clifton, 98 Ill App 2d 383, 386. In the instant case, the police officers were told by the informer that the defendant was a runner for the occupant of the basement apartment. They knew that until the time Durley entered the apartment the sale of narcotics had not taken place. After the search of defendant, the police could reasonably conclude that the prerecorded funds had been transferred in the apartment where the informer indicated Durley had entered. Based upon these facts, the arrest of the occupant of the apartment and the search incident to that arrest were completely proper and legal. People v. Wright, 42 Ill 2d 457, 460; People v. Bambulas, 42 Ill 2d 419, 423; People v. Durr, 28 Ill 2d 308, 311; People v. Ramirez, 124 Ill App 2d 407, 412; and People v. Ramos, 112 Ill App 2d 330, 335.

Defendant next urges that the trial court should have sustained the motion to suppress since, based upon the facts of this case, the police officers could not have obtained either a search or arrest warrant. In determining whether a search is improper because a warrant was not obtained, the test is not whether it is practicable to obtain a warrant, but whether the search was reasonable. Cooper v. California, 386 U S 58, 62; United States v. Rabinowitz, 339 U S 56, 66; People v. Wright, 42 Ill 2d 457, 459; and People v. Jones, 31 Ill 2d 240, 243. The facts here indicate that the arrest of Evie Mae Carter was based upon probable cause and that the search of her apartment was incident to a lawful arrest. Thus, the failure of the police to obtain either an arrest or search warrant was not fatal and cannot be grounds for the suppression of the evidence found as a result of the search.

Defendant's final argument is that the motion to suppress should have been granted by the trial court since the search of Carter's apartment went beyond the permissible limits established in Chimel v. California, 395 U S 752. The search in the instant case took place on September 15, 1966, and Chimel was not decided until June 23, 1969. The Illinois Supreme Court has determined that Chimel should not be given retroactive effect and therefore that decision has no applicability. People v. Wilson, 46 Ill 2d 376, 382. See also People v. Perry, 47 Ill 2d 402, 408. The trial court was correct in denying defendant's motion to suppress.

We will add that even if error of constitutional dimension had occurred at the trial, this would not necessarily require reversal of the judgment. Even excluding the prerecorded money from consideration, the remaining proper and competent evidence is an amply sufficient basis for the finding of guilt. See People v. Rush, 126 Ill App 2d 136, 142 and additional authorities there cited. See also People v. Ridener, 129 Ill App 2d 105, 108; People v. Thompson, 128 Ill App 2d 420, 426; People v. Owens, 126 Ill App 2d 379, 383; and People v. Landgham, 122 Ill App 2d 9, 24.

The conviction of John Durley for the unlawful sale of narcotics should be and it is affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J. and LYONS, J. concur.

54689

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
	)	CIRCUIT COURT,
vs.	)	
	)	COOK COUNTY.
LEVI ROYSTER, Defendant-Appellant.	)	HON. ROBERT J. COLLINS, Presiding.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a jury trial of the offenses of attempt burglary and the possession of burglary tools. He was sentenced to a term of five years to twelve years in the penitentiary on the attempt burglary conviction, and to a term of one year to two years on the possession of burglary tools conviction, the sentences to run concurrently. On appeal defendant contends that he was not proven guilty beyond a reasonable doubt.

The complaining witness, Miss Eileen McCormick, testified that on October 26, 1968 she was the owner of a home located at 5218 West Washington Street in Chicago. The witness testified that she used the rear door of the building on an almost daily basis in going to and from her garden. Miss McCormick testified that she observed the rear outer storm door, which was painted white, on October 25, 1968 and that there were no marks on it at that time, but that when she observed the door the following morning, she noticed scratch marks on the door "near where the hook is." She further testified that the marks were a few inches long and that they appeared to have been made by a fairly sharp instrument. Miss McCormick stated that she did not know the defendant and that she did not give him permission to be on her premises.

James McNeil testified for the People and stated that he

resided next door to the McCormick home. About 7:00 A.M. on October 26, 1968 Mr. McNeil was in the basement laundry area of his home when he observed the defendant peering at him through a basement window. Defendant then walked to the rear of the McCormick building.

Between 8:00 and 8:30 that morning Mr. McNeil exited his home on his way to work when he observed the defendant on the rear porch of the McCormick residence, holding a screwdriver against the wooden storm door. Defendant stated to McNeil, "Good morning, my man," and left the premises. McNeil re-entered his house and told his wife to telephone the police. Defendant was last seen by the witness running down the alley behind the homes in question.

It was brought out on cross-examination that Mr. McNeil testified at a hearing before the grand jury, but that the grand jury testimony did not reveal that the witness saw defendant actually holding the screwdriver against the door as was testified at the trial.

Chicago Police Officer John McLemore testified that he responded to a radio dispatch about 9:00 A.M. on October 26, 1968 and that he went to the McNeil residence where he was given a description of the culprit by Mr. McNeil. The officer conducted a routine search of the areaways and hallways of nearby buildings in an attempt to locate him and found the defendant in a hallway of a nearby building. As Officer McLemore entered the hallway, the defendant dropped a screwdriver which the officer retrieved and turned over to a police evidence technician.

On direct examination the officer testified that Mr. McNeil told him that McNeil observed the defendant holding the screwdriver against the storm door, but on cross-examination of the

officer it was brought out that the officer's police report made pursuant to his interview of McNeil on the day in question did not recite that McNeil told the officer that defendant was holding the screwdriver against the door.

Edwin McNulty testified that he was a police evidence technician and that the screwdriver was turned over to him by Officer McLemore. He testified that the screwdriver was capable of being dusted for fingerprints, but that Officer McLemore's handling of the screwdriver "contaminated it." McNulty also testified that he was unable to find fingerprints on the rear door, but that there were fresh scratch marks on the paint of the door.

In contending that his guilt was not proven beyond a reasonable doubt, defendant first points to the alleged difference between Mr. McNeil's trial testimony and his grand jury testimony relative to whether defendant had placed the screwdriver against the storm door.

Mr. McNeil's testimony at trial that he observed the defendant place the screwdriver against the door is corroborated by the testimony of Miss McCormick and of Officer McNulty, that there were fresh scratch marks on the door near the door's hook. The fact that such testimony does not appear in the witness' testimony before the grand jury does not mean that he altered his testimony at trial. It may well be that the witness was never questioned at the grand jury hearing whether the defendant had the screwdriver against the door. The determination as to the credibility of the witnesses was for the trier of fact.

Defendant also points to the fact that Officer McLemore's police report does not contain the statement by McNeil that defendant had the screwdriver pressed against the door, whereas

the officer testified at trial that McNeil told him so on the date in question. What the officer testified to and what appeared in his report was likewise for resolution by the trier of fact.

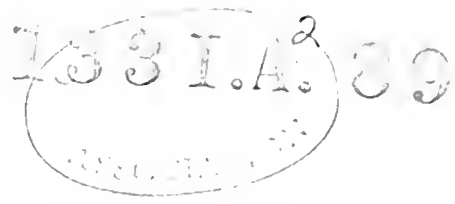
The People's evidence showed the defendant guilty of the offenses of which he had been charged. Defendant was first seen in the area of the McCormick residence at 7:00 in the morning, and later was seen on the rear porch of the premises with a screwdriver placed against the wooden, painted storm door. After being observed on the latter occasion, the defendant fled down an alley. The police were summoned and were given a description of the culprit, and defendant was found in a hallway in the vicinity of the McCormick home with the screwdriver in his possession. The substantial step toward the commission of the burglary taken by the defendant is evidenced by his possession of the screwdriver, his holding the screwdriver against the storm door, and the fresh scratch marks on the door near the door's hook. Defendant was also seen on premises where the owner of those premises testified he had no right to be. From all the evidence the defendant was proven guilty beyond a reasonable doubt of the offenses of attempt burglary and the possession of burglary tools. See People v. Apple, 91 Ill. App. 2d 269; People v. Nugara, 39 Ill. 2d 482, 486.

For these reasons the judgments are affirmed.

JUDGMENTS AFFIRMED.

LYONS and GOLDBERG, JJ., concur.

54580



PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
vs.	)	
GEORGE FOX, Defendant-Appellant.	)	Honorable James D. Crosson, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendant, George Fox, was charged with murder in violation of Ill. Rev. Stats. (1967), ch. 38, § 9-1. Following a bench trial, the defendant was found guilty of involuntary manslaughter and was sentenced to the Illinois State Penitentiary for not less than eight nor more than ten years.

On appeal, the defendant raises two contentions. First, he contends that his conviction for involuntary manslaughter may not stand because the killing was intentional and not the result of reckless conduct; second, he contends that he was not proven guilty beyond a reasonable doubt.

At trial the State presented three witnesses. The first, Herbert Cameron, testified that he was driving his automobile in the vicinity of Kedzie Avenue and Fulton Street, Chicago, on May 25, 1968, at approximately 4:30 P.M. With him in the auto were Nolan Coles and two other men. Coles had loaned five dollars to Cameron and needed immediate payment of the debt. Cameron hoped to borrow some money from a friend, Velma Fox, and he parked his car across the street from Velma's house. Leaving the three passengers sitting in the car, Cameron left the auto and went over to knock on Velma's door. Velma's mother informed Cameron that Velma was not at home and, as Cameron turned to leave, the defendant, Velma's brother, came to the door. Cameron asked the defendant to loan him five dollars. The defendant indicated that he had no money but would get some if Cameron would

drive him to the south side. Cameron agreed and the two men walked over to Cameron's parked auto. Cameron entered the auto and sat behind the steering wheel. The defendant remained standing outside the car and told Cameron that he didn't want the company of "these greasy studs," referring to the three passengers in Cameron's car. Apparently Nolan Coles, who was sitting in the rear of the car, took offense with the defendant's comment and said something in response. Coles then got out of the car and walked around to the rear of the vehicle. Coles came up on the defendant's side of the auto and the defendant swung his arm toward Coles. The defendant then walked away and Cameron got out of the car. Cameron saw Coles still standing near the auto and noticed blood on Coles' chest. Cameron then helped Coles into the auto and took him to a nearby hospital. Cameron indicated that he did not see any weapons in the hands of either the defendant or Nolan Coles during their encounter.

On cross-examination Cameron was impeached concerning certain details of his testimony by reference to a written statement he had given the police on June 2, 1968. A relevant portion of that statement was:

> I tell you right now when Coles got out of the back seat, he did not have no knife or nothing. I was still sitting in the car. I told Coles to get back into the car and told Fox to go on away. Coles told Fox that he did not want anybody talking to him like that because he was no bum. The next thing I saw was Fox swinging his hand with a knife in it and he hit Coles in the chest. Then I jumped out the car and asked Fox what the hell he called himself doing, because that was my car and not his. Then I noticed Coles standing there bending over holding his chest. Then Coles moved his hand and then I saw blood on his shirt. I opened Coles' shirt and saw the hole in his chest. Meanwhile Fox had walked away. I called to the other fellows to help me because Coles was hurt, but both of them did not help me. They both ran down Kedzie. I helped Coles back into the car and drove him to the hospital.

Next, a series of evidentiary stipulations established that Nolan Coles died from a stab wound of the right chest and

lung and that an analysis of Coles' blood showed the presence of 99 milligrams percent ethanol.

Charles Adams appeared as the second witness for the State. Adams testified that he was a passenger in Cameron's auto on the date in question. Adams substantially corroborrated Cameron's testimony concerning the events leading up to the stabbing incident. Adams indicated that after Nolan Coles left the auto, Coles went around the back of the car and put his hands on the trunk of the car. Then the defendant, who was standing on the driver's side of the car, moved toward the rear of the car and "turned around and stabbed him sideways. He was standing sideways and stabbed him backhand." Adams was asked to demonstrate how the stabbing occurred and, as indicated by the record:

> . . . the witness is demonstrating with his right hand and arm by bringing the right hand and arm from his body out away from the body and towards the right side, sort of backhand as he had indicated. . . .

Adams further testified that the knife blade broke during the stabbing and the broken piece fell to the ground. The defendant ran from the scene and Coles was taken to the hospital.

Detective Bruce Tate of the Chicago Police Department testified that the defendant voluntarily surrendered to the police about five o'clock on May 27, 1968. A statement was given by the defendant at that time and, according to Tate:

> . . . he [the defendant] says the fellow got out of the car, came around on his side and he said he started backing off of him. And he says that at this time he looked down at his hands and he had something, which might have been a glove or a blackjack, he said it was black in color. He says he don't remember what it was. He says he starts swinging the knife sideways, from side to side, to keep the man off of him. He says at this time the man ran into him and started to place a bear hug around his back, and at this time the knife stuck into the man's chest.

A stipulation established that the defendant was forty-six years of age. The State then rested its case in chief and a defense motion for a directed verdict was denied.

Testifying on his own behalf, the defendant stated that Coles had provoked the argument by making derogatory remarks about his aunt and by threatening to do him harm. According to the defendant:

> [Coles] jumps out of the car and said, 'Don't tell me what to do.' And rounds around the car with the object in his hand, the black object. I said, 'Look, you don't have to talk like that.' And I started backing up from the car. . . . And when I turn around that is when I seen him with the object and he lunged at me. When I stumbled back into the car I got the pen knife out [from a coat pocket] and when he lunged at me I just hit back. . . .

The defendant denied that Coles had his hands on the trunk of the car when the stabbing occurred and indicated that he fled only because he "felt scared."

On cross-examination, the defendant stated that he slashed out with the knife "maybe about twice" and demonstrated the backhand motion he had used. He also indicated that he had been waving the knife "to keep him [Coles] off."

For his first contention the defendant asserts that because he raised the defense of self-defense, he did, in effect, admit that the killing was intentional. Consequently he maintains that his conviction for involuntary manslaughter was not proper because involuntary manslaughter cannot arise from an intentional killing.

In making this argument in the instant case, defendant overlooks the fact that there was ample evidence to support the finding that in killing the deceased, the defendant acted recklessly rather than in self-defense. Although defendant testified that the deceased attacked him with a black object, he also testified that he began waving his knife in a backhand fashion merely to keep the deceased away from him. None of the other witnesses testified that the deceased had a weapon of any kind, nor did they testify that the deceased was the aggressor. Rather, they indicated that the deceased was standing at the rear of the auto

when defendant began waving his knife in a sideways, backhanded fashion. An apparent inference that may be drawn from the unusual manner in which the defendant waved the knife is that he merely sought to frighten the deceased. Thus, under the circumstances of this case, we believe that the defendant's actions in waving his knife somewhat wildly in a sideways, backhanded fashion could properly be viewed as reckless conduct. In any event, the trial court was entitled to consider all of the evidence and draw inferences therefrom. The court was certainly not compelled to believe defendant's testimony that he acted in self-defense. As we have indicated, therefore, we believe that there was sufficient evidence adduced to reveal reckless conduct on the part of defendant and we accordingly find that under the evidence a conviction for involuntary manslaughter was proper. See People v. Reece, 123 Ill. App. 2d 97, 259 N.E. 2d 619 (1970). Moreover, it has been held that where a person is indicted for murder and found guilty of involuntary manslaughter, a lesser included offense, he cannot complain if the evidence was of such a character that it may also have justified the court in finding him guilty of a higher offense. People v. Green, 23 Ill. 2d 584, 179 N.E. 2d 644 (1962); People v. Bailey, 56 Ill. App. 2d 261, 205 N.E. 2d 756 (1965).

Under his second contention, defendant asserts that he was not proven guilty beyond a reasonable doubt. Ill. Rev. Stats. (1967), ch. 38, § 9-3, provides:

> (a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.

As we have already noted in our analysis of defendant's first contention, we believe that there was ample evidence to establish that defendant acted recklessly by his actions in waving the knife. We have also indicated that the trial court was not obligated to

believe that the defendant was acting in self-defense. The sole question remaining, therefore, is whether the defendant's acts were of a character "likely to cause death or great bodily harm to some individual." The answer to that question is obvious. This court would be hard pressed to find any act more likely to cause death or great harm to an individual than that of wildly waving a knife at someone as was done in this case. Thus, it is our opinion that each element of the offense of involuntary manslaughter was proven by the State in this case and we find no legal basis which would justify a substitution of our judgment for that of the trial court.

For the reasons we have stated, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J., concur.

No. 54034

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
vs.	)	
	)	
RONALD BOWEN,	)	HONORABLE
	)	PHILIP ROMITI,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE McGLOON DELIVERED THE OPINION OF THE COURT.

This is an appeal of a jury verdict finding defendant guilty of criminal trespass to a vehicle. The sole issue raised by the defendant on appeal is that he was not proven guilty beyond a reasonable doubt due to an identification which was vague, doubtful and uncertain.

We affirm.

Because of the issue raised, we must closely examine the facts of the case. On August 5, 1968, Mr. Shive, the identifying witness, was sitting on the front porch of his house. He testified that he saw defendant Bowen walk up to a Buick automobile which was parked across the street, enter that car, remain for a few minutes, then exit. Thereafter, defendant looked into two or three other cars, crossed the street about 100 feet west of Shive's house, and walked down the sidewalk passing within 10 feet of where Shive sat. Defendant then walked up to an automobile that was parked five houses east of Shive's house. Shive claims he heard a "peck" and that a few minutes later the car pulled out and was driven away by defendant. Shortly thereafter Shive approached the owner of the car and notified him that it was gone, after which he returned home. Sometime later Shive and the owner went looking for the car, and upon finding it in a damaged condition parked three or four blocks away, the owner called the police. At that point, Shive told the police that he knew who stole the car and directed them to defendant's home.

According to the testimony of the arresting officer, when the police arrived at defendant's house, he attempted to evade them by running down a passageway. He was apprehended and maced.

One of the officers testified that while at the police station he overheard the defendant say to the owner of the car, "I'll give you $900 if you forget about this whole thing, because I know I'll go back." This statement was corroborated by the owner of the car and the identifying witness, Shive. The defendant tried to discount it by testifying that his actual statement to the owner of the car was, "I had a '61 Chevy that's worth $900, and I would have no reason to steal yours."

Defendant attempts to discredit the testimony of the identifying witness Shive by raising the following points: 1) Mr. Shive was not sure if the two police officers were in plain clothes or uniform. 2) Mr. Shive was 64 years old, wore glasses (which had not been changed in three years), and was somewhat hard of hearing. 3) Mr. Shive testified that when defendant walked by he was wearing a brown shirt and brown pants, whereas defendant testified that the shirt was blue. 4) Mr. Shive testified that he did not notice blood on defendant's face and shirt after the arrest, whereas the arresting officers testified that such blood was present. 5) Mr. Shive testified that a small tree did not interfere with his view of defendant while defendant was breaking into the car. Defendant on appeal presents a photograph of what appears to be a large tree between the site where the photographer stood and the general area where the car was parked.

A jury verdict will not be set aside by this court unless it is palpably against the weight of the evidence, or is so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. People v. Hampton, 44 Ill. 2d 41, 253 N.E. 2d 385 (1970).

Points one through four raised by the defendant in this appeal go directly to the issue of Mr. Shive's adequacy as an eyewitness. Defendant hopes to show, through their recitation, that the witness had such poor powers of observation that what he purported to observe is doubtful. However, we might note what this court said in the case of People v. Fortson, 110 Ill. App. 2d 206, 212, 249 N.E. 2d 260 (1969):

> The adequacy of the identification raises a question of the credibility of the witnesses which is a matter for the determination of the jury, sitting as triers of fact with the superior opportunity not only to hear the testimony of the witnesses but to observe their demeanor while on the witness stand. People v. Jackson, 28 Ill. 2d 566, 192 N.E. 2d 873 (1963); People v. Evans, 25 Ill. 2d 194, 184 N.E. 2d 836 (1962).

The jury had ample opportunity to view all of the testimony, especially that of Mr. Shive, and to observe his demeanor while testifying. Also, we might note that Mr. Shive testified that defendant passed within 10 feet of him, that the lighting was more than adequate to observe the defendant, that he knew the defendant for 15 years and never had hard feelings toward him or the defendant's family.

Defendant's point five is not convincing to this court. First, the photograph was not taken from the exact position from where Shive observed defendant at the automobile. Second, no matter how Mr. Shive described the tree, he testified at trial that it did not impair his line of vision. Evidence to the contrary is best introduced at trial where factual matters are to be determined.

Mr. Shive's testimony, considered in conjunction with the corroborated evidence of defendant's offer of money to the complaining witness to drop the matter, and the arresting officer's testimony of defendant's attempted flight and resistance, supports a verdict of guilty.

JUDGMENT AFFIRMED

McNAMARA, P.J., and DEMPSEY, J., concur.

69-32

PEOPLE VS. EDWARD AIKENS

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and seventy, within and for the Third District of Illinois:

Present—

HONORABLE HOWARD C. RYAN, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE JAY J. ALLOY, Justice

JOHN E. HALL, Clerk

WAYNE E. HESS, Sheriff

BE IT REMEMBERED, that afterwards on DECEMBER 14, 1970 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

NO. 69-32

IN THE

APPELLATE COURT OF ILLINOIS

Third Judicial District

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- EDWARD AIKENS, Defendant-Appellant.	Appeal from the Circuit Court of Kankakee County Honorable Victor N. Cardosi Presiding Judge

RYAN, P.J.

Abstract

This is an appeal from an order of the trial court denying a Petition for a Writ of Replevin.

Edward Aikens was arrested on January 5, 1968, and was turned over to Elmer S. Nelson, Sheriff of Kankakee County, Illinois. At that time the defendant surrendered his wallet containing his registration card and social security card. He also surrendered $213 in cash. On April 1, 1968, Aikens pleaded guilty to a charge of conspiracy and was sentenced to a term of not less than four nor more than five years in the Illinois State Penitentiary.

On May 27, 1968, Aikens filed a motion for return of money and personal property requesting substantially the same relief as is requested in the Petition for a Writ of Replevin which is involved in this appeal. A hearing on the motion for the release of money and personal property was set for July 10, 1968. The court ordered the issuance of a Writ of Habeas Corpus Ad Testificandu directing the sheriff of Cook County (who for reasons not explained in the record then had custody of Aikens) to deliver him to the court for the hearing set for July 10. For an unexplained reason, Aikens was not brought to court on that date and no hearing on the motion for release of money and personal property was held.

Later Aikens filed several pro se documents including a Petition for Writ of Habeas Corpus and on October 28, 1968, he was produced in court pursuant to a Writ of Habeas Corpus Ad Testificandum. The public defender was appointed to represent him and on the same date Aikens filed a Petition for a Writ of Replevin in the criminal case charging that the sheriff of Kankakee County wrongfully withheld $213, his wallet, registration card, and social security card. The sheriff was not served with summons nor given notice of the filing of the Petition for a Writ of Replevin but the court ordered the States Attorney to plead to the same within 15 days. The States Attorney never complied with this order of the court.

A hearing on Aikens' Petition for a Writ of Habeas Corpus was set for April 1, 1969, and on that date Aikens was present in court in the custody of the sheriff of Cook County. A hearing was had on the Petition for Writ of Habeas Corpus and the same was denied. Aikens then raised the question of the Petition for Writ of Replevin and the court denied this petition also. This appeal was taken from the order of April 1, 1969, denying Aikens' Petition for a Writ of Replevin. More than a year later the trial court held a hearing on Aikens' motion for return of money and personal property and this motion was denied. No appeal has been taken from this last order.

A mild description of the tangled situation in this case would be to say that confusion reigns. This confusion has been brought about by the fertile imagination of Aikens and his prolific production of petitions and pleadings and his filing of the same pro se in the trial court, in this court, and in the Supreme Court of this state. Many of these papers were simply querulous criticisms of the court, the court officials, the court procedures and counsel. Many were filed during the time when the court was trying to ascertain what relief a previously filed document requested. This court has received a considerable

amount of correspondence from Mr. Aikens, none of which complied with any recognized standards of pleading and none of these documents set forth plainly any description of the relief sought. In an attempt to bring some order out of chaos, this court requested the District Defender of the Illinois Defender Project for the Third Judicial District to represent Aikens. This, the District Defender agreed to do and this appeal was prosecuted from an order of the trial court denying Aikens' Petition for a Writ of Replevin.

We are of the opinion that the trial court was correct in denying the Petition for Writ of Replevin. This case is a criminal case and Replevin is a civil action and is governed by the provisions of the Replevin statute (Ill. Rev. Stats., Chapter 119, Section 1 et seq) and the Civil Practice Act (Ill. Rev. Stats., Chapter 110, Section 1 et seq).

The procedural requirements of neither of these statutes were followed. There is no showing in the record that jurisdiction was ever obtained over Elmer S. Nelson, Sheriff of Kankakee County. The trial court had no jurisdiction of the subject matter of the petition in this criminal case or of the nominal defendant, the sheriff, and therefore had no authority to entertain the Petition for Writ of Replevin in this proceeding.

To so hold and not to address ourselves to the real question involved would not dispose of the issue, but would only serve to invite further pro se letters, petitions, etc. from Aikens. The issue involved is whether Aikens is entitled to the return of his wallet, registration card and social security card and whether he is entitled to the $213. The States Attorney implied that these items had been held as possible exhibits in further criminal prosecutions. There appears to be no question as to Aikens' ownership of all of the items except the $213 in cash. The record does not indicate what the future prosecutions may be or why these items of personal property may be needed. This

court is of the opinion that a hearing should be held to determine whether there is any reason for further withholding these items of personal property from Aikens. A hearing should also be held to determine whether or not Aikens is the owner of the $213 in cash. If he is found to be the owner, a determination should likewise be made as to whether or not there is any reason for withholding this money from him.

In order to accomplish this, this court remands this case to the trial court with directions to the attorney for Aikens to file a petition in this cause in the Circuit Court of Kankakee County requesting a release of exhibits and a surrender of the same to Aikens. The petition should allege, if such be the case, a claim to ownership by Aikens to the carious items. If the States Attorney has any knowledge that Aikens does not own any of the items sought to be recovered an objection to the petition should be filed setting forth any other claim to ownership to these items which may have been made or of which he may have knowledge. If the States Attorney has further need of these items as exhibits in any pending criminal prosecution the same should be set forth in his objections as specifically as the circumstances will permit. The issues should be thus clearly drawn so that when this case is again brought before this court, we will have a record on specific issues which will lend itself to review.

REMANDED WITH DIRECTIONS.

STOUDER, J. concurs.

ALLOY, J. concurs.

54662

HERMAN PRYOR, JONELL PRYOR, RICHARD PRYOR, a minor, SANDRA PRYOR, a minor, LINDA PRYOR, a minor, and STEVEN PRYOR, a minor, Plaintiffs-Appellants, vs. ALBERT A. ANDREU, a/k/a ALBERT A. ANDREW, Individually and d/b/a THE BROWN JUG INN, Defendant-Appellee.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HONORABLE HAROLD G. WARD, and HONORABLE THOMAS H. FITZGERALD, Presiding.

MR. JUSTICE STAMOS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a vacature of default judgments.

On December 23, 1966, Herman Pryor, one of the plaintiffs, was assaulted and injured by Thomas Ferro and Robert Tabler who were allegedly under the influence of alcoholic liquor sold or given to them by the sole defendant, Albert Andreu, a dram shop licensee.

On December 21, 1967, Herman Pryor, his wife and children filed suit, pursuant to Ill. Rev. Stat. (1967) ch. 43 § 135 (Dram Shop Act) seeking damages for injuries and loss of support from defendant, who was served with summons on January 19, 1968. On June 28, 1968, there being no appearance or answer filed a default order was entered. On September 17, 1968, the matter came before the Assignment Judge to be assigned out for a prove-up of damages, at which time plaintiffs' counsel was directed to draft an order for the court's signature which would dismiss Thomas Ferro from the suit. Counsel advised the court that Ferro was not a defendant, but was mentioned in the complaint. However, in compliance with the court's direction, counsel drafted the following order:

> "This cause coming on for prove-up and the Court having jurisdiction and no summons having been served on Thomas Ferro It Is Hereby Ordered that Thomas Ferro, be and is hereby dismissed."

This order was executed by the court in counsel's presence

and the case was then assigned to Judge Fitzgerald for prove-up of damages.

A hearing was conducted and on September 19, 1968, Judge Fitzgerald entered judgment orders in favor of the plaintiffs in the total amount of $33,000.00 against defendant.

On January 21, 1969, defendant was served with a Notice of Levy and on March 5, 1969, he filed a Petition pursuant to Ill. Rev. Stat. (1967) ch. 110 § 72 to vacate the judgment orders. This Petition asserted three grounds for relief:

1. The trial court had no jurisdiction because defendant was not served with summons;

2. The assault complained of occurred on December 18, 1966, and therefore was barred by the statute of limitations; and

3. Defendant was dismissed from the case on September 17, 1968, by Order of the Assignment Judge.

Judge Fitzgerald conducted a hearing and on September 18, 1969, entered an order which found that defendant was personally served with summons, and that the complaint was timely filed.

In support of the third contention, defendant produced the order of September 17, 1968, executed by the Assignment Judge, which then read as follows:

> "This cause coming on for prove-up and the Court having jurisdiction and no summons having been served on Thomas Ferro It Is Hereby Ordered ANDREU DBA BROWN JUG INN that ~~Thomas-Ferro~~ be and is hereby dismissed."

Judge Fitzgerald then entered a further order that found:

> (3) that the judgments of September 19, 1968, were entered notwithstanding a mistake of fact unknown to the Court which had it been known to the Court, said judgments would not have been entered and that relief under Section 72 of the Civil Practice Act should be granted to the defendant Petitioner.

Whereupon, Judge Fitzgerald vacated the judgment orders previously entered on September 19, 1968.

Plaintiffs thereupon appeared before the Assignment Judge and

moved to vacate the order of September 17, 1968, wherein the defendant was dismissed, and further moved that the court do so nunc pro tunc. During a hearing upon this motion it was established that the Assignment Judge's secretary had altered the order of September 17, 1968, and provided the interlineation after the court had executed the order dismissing Ferro. The Assignment Judge vacated the order dismissing the defendant and placed the case on the call, but denied the motion that it be effective nunc pro tunc as of September 17, 1968.

Plaintiff then reappeared before Judge Fitzgerald, alleged the foregoing and moved that the court vacate its vacatures of the judgment orders. This was denied and plaintiff then appealed.

OPINION

The Assignment Judge's secretary's alteration of the order of September 17, 1968, was a nullity and of no legal consequence. It was an unauthorized tampering of an order of the court. A Section 72 petition is addressed to the sound legal discretion of the trial court and this court will only interfere when there is an abuse of that discretion. Goldman v. Checker Taxi Co., Inc., 84 Ill. App.2d 318.

We find that the trial court abused its discretion when it vacated its judgment orders predicated upon the secretary's alteration. To sustain the vacature of these judgment orders under these circumstances would be to adopt a doctrine which would make effective any alteration, modification or substitution of court records by interlopers and trespassers. It would give such alteration, modification or substitution the same dignity as an order duly entered by a court.

The rights and obligations of litigants should not be diminished or enhanced by such conduct. Therefore, the order granting defendant's Section 72 relief is hereby reversed and the cause is remanded with directions to reinstate the judgment orders entered

54662

on September 19, 1968.

REVERSED AND REMANDED WITH DIRECTIONS.

LEIGHTON, P.J., and McCORMICK, J., concur.

No. 54849

133 I.A.2 146

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. ANTHONY CHAMPAGNE, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE MARGARET G. O'MALLEY, PRESIDING.

MR. PRESIDING JUSTICE LEIGHTON DELIVERED THE OPINION OF THE COURT:

Defendant was charged with battery. He waived trial by jury, was found guilty and sentenced to pay a fine of $100.00. On appeal, he contends his conduct at the time of the alleged battery was with legal justification; or in the alternative, that he was not proven guilty beyond a reasonable doubt.

Evidence in the record discloses that on February 16, 1969 Miss Phyllis Macaluso was employed as a non-uniformed store detective by Sears, Roebuck & Company in its store at Harlem and North Avenues in Chicago. At about 9:25 P.M., Miss Macaluso pursued a woman shoplifter to the street and requested that she return to the store. The woman refused. Miss Macaluso struggled with the shoplifter. Just then, defendant came out of the store, saw the two women, went to them and pulled Miss Macaluso away from the shoplifter, who escaped. Miss Macaluso called other Sears' employees who, at her request, detained defendant until the police came and arrested him. Sometime later, Miss Macaluso went to a hospital where she was given a prescription because "[m]y arm pained me." The next day she filed a complaint charging defendant with battery.

At his trial, Miss Macaluso testified that when defendant came to where she was struggling with the shoplifter, "[h]e asked me what was going on and I said this lady was shoplifting and I was a store detective for Sears. ... Then he said: 'Let her go.' With that, he pulled both of my arms away from her. 'Let her go,' he said and twisted one arm behind my back and held me until she got away. Then he let me go." A fellow

employee, Shirley Hanna, testified that she saw defendant take hold of Miss Macaluso and then saw the shoplifter run away. She heard Miss Macaluso (whose employee number was 211) say to defendant "[s]he was 211 ... 'I am the security ...' or 'I am 211' ... ."

Defendant testified that he saw the two women "grabbing each other" and that Miss Macaluso raised her hand to strike. "I believed there was a fight between these two women and the one that ran away being the smaller of the two, was going to be hurt when this one raised her arm." Defendant said that he received no response when he went to the two women and asked, "What's this all about? What's going on here?" He said that "[b]y the time I got through asking her, the woman -- the other woman -- was gone." Then, according to defendant, Miss Macaluso requested her fellow employees to detain him. When defendant asked for the reason, Miss Macaluso said, "You made that woman ran away from me (sic). I was trying to arrest her." Defendant testified that it was then that he learned Miss Macaluso was a Sears' store detective.

It is defendant's contention that the evidence proved he believed there was a fight between Miss Macaluso and the woman shoplifter; and that he acted with legal justification when, as shown by his testimony, he "[g]rabbed her (Miss Macaluso) by the arm and separated ..." her from the other woman. In support of this contention, defendant relies on People v. Williams, 56 Ill. App. 2d 159, 205 N.E. 2d 749, a case in which a taxi driver saw some young men beating an old man who called for help. When the taxi driver responded, the youths shouted insults and threw a cement block and bricks at the cab. The driver had a gun, fired two shots in the direction of the youths, killing one of them. In reviewing the conviction of involuntary manslaughter, we reversed, holding that under the circumstances, the taxi driver was justified in going to aid the old man; and because

he was where he had a lawful right to be, he could stand his ground, and if reasonably apprehensive of injury, could take his assailant's life. The crucial point in Williams was the fact that the taxi driver acted with legal justification when he went to the aid of another who was being subjected to unlawful use of force.

In the case before us, whether defendant had reason to believe that the shoplifter was being subjected to unlawful force was a question of fact for the trial judge to determine. See United States v. Grimes, 7 Cir. 413 F. 2d 1376 (1969); People v. Irvin, 104 Ill. App. 2d 316, 244 N.E. 2d 351. Defendant's argument assumes the circumstances were as he described them, overlooking the conflict between his testimony and that of the other two witnesses. It was the function of the trial judge to resolve the conflict in the testimony. As the reviewing court, we cannot substitute our judgment for his on questions concerning credibility of witnesses, unless the evidence is so unsatisfactory that it leaves a reasonable doubt of defendant's guilt. People v. Rush, 126 Ill. App. 2d 136, 261 N.E. 2d 526. Our review compels us to conclude that there was evidence from which the trial judge could find defendant was told by Miss Macaluso that she was a store detective and that the woman with whom she was struggling was a shoplifter. Under these circumstances, defendant did not act with legal justification when he touched Miss Macaluso in the manner shown by the evidence. This was a battery.[1/] People v. Grieco, 44 Ill. 2d 407, 255 N.E. 2d 897.

Defendant also contends that even if he lacked legal justification for his conduct, the evidence of the State did not prove him guilty of battery because there was no proof Miss Macaluso suffered bodily harm within the meaning of Ill.

1/ Ill. Rev. Stat. 1969, ch. 38, §12-3(a)(1).

Rev. Stat. 1969, ch. 38, sec. 12-3(a)(1). This argument belittles the complainant's uncontradicted testimony that she went to a hospital, was given a prescription and that she had pain in her arm. "Bodily harm is generally defined as 'any touching of the person of another against his will with physical force in an intentional, hostile and aggravated manner, or projecting of such force against his person'." People v. Tanner, 3 Cal. 2d 279, 297, 44 P. 2d 324, 332 (1935) and compare People v. Allen, 117 Ill. App. 2d 20, 28, 254 N.E. 2d 103. As thus defined, the record contains evidence of bodily harm. Judgment is affirmed.

AFFIRMED.

McCORMICK, J. and STAMOS, J., Concur.

Publish abstract only.

54734

IN RE ESTATE OF MICHAEL J. FLYNN, Deceased

PIONEER TRUST AND SAVINGS BANK,

Administrator-Appellant

vs.

GERTRUDE E. JOHNSON,

Claimant-Appellee.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

HON. ANTHONY J. KOCUT, Magistrate Presiding.

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Administrator of the Estate of Michael J. Flynn, from an order allowing Gertrude E. Johnson's claim against the estate in the amount of $9,342.23 and from an order striking Count I of an amended counter-claim.

On April 26, 1968, Gertrude E. Johnson filed a claim against the estate of the decedent in the aggregate amount of $8,618.52 plus interest. She alleged that the decedent became and the estate still was indebted to her upon three promissory notes. Copies of the notes were attached to the claim. On July 23, 1969, the administrator filed an amended answer and counter-claim. In the Amended Answer, the administrator stated merely that "[i]t denies the allegations set forth" and prayed that the entire claim be denied.

At the trial, Ella Flynn, a sister and heir-at-law of the decedent, testified that she lived with her brother for the 29 years preceding his death and that she was familiar with his handwriting. She identified her brother's signature on the three notes and further identified his handwriting on a letter addressed to Gertrude Johnson and dated November 15, 1964. The following acknowledgment appeared on the back side of the letter: "You have (& I rec'd from you your good hard earned money). My 8/15/62 note - 7118.52, my 8/15/62 note - 1,000, my 10/16/63 note 500.00."

Gertrude Johnson, the claimant, then testified over objection that none of the money due under the notes was repaid. The three notes and the letter were offered and received into evidence. The administrator presented no evidence.

The administrator contends that the evidence presented at trial was insufficient to sustain the allowance of the claim. It is argued that since the administrator denied the decedent's indebtedness to the claimant, it was incumbent upon her to prove the making and delivery of the notes by the decedent and the possession thereof by her at the time of the decedent's death.

We agree with the administrator that Gertrude Johnson had the burden of proving her claim. We, however, have carefully examined the evidence and conclude that she has sufficiently establishe a prima facie case of the making and delivery of the notes and of her possession thereof. Ella Flynn identified the decedent's signature on the three notes, and the letter acknowledges the existence of consideration for the notes and the possession of the notes by the claimant. These facts were unrebutted by the administrator who presented no evidence. The allowance of a claim should not be set aside when, as here, there is evidence in the record which supports that claim. In re Estate of Brumshagen, 27 Ill. App. 2d 14, 169 N.E. 2d 112.

We must note the generality of the administrator's answer. The object of the pleadings is to apprise the opposing party of the facts which give rise to a claim or to a defense so that due preparation may be made for trial. Yeates v. Daily, 13 Ill. 2d 510, 150 N.E.2d 159. Here, the administrator simply made a general denial of the allegations in the complaint. He did not specifically plead the defenses of non-delivery or of lack of consideration.

The administrator relies upon In re Estate of Brandt, 109 Ill. App. 2d 172, 249 N.E.2d 876, In re Estate of Herr, 16 Ill. App. 2d 542, 148 N.E.2d 815, Bippus v. Vail, 230 Ill. App. 633, and Halladay v. Blair, 223 Ill. App. 609 for the proposition that the claimant must prove delivery in order to recover on the notes. These cases are of no help to the administrator because here the letter in the handwriting of the decedent acknowledges delivery of the notes to the claimant. In re Estate of Pecoulas, 98 Ill. App. 2d 440, 240 N.E. 2d 311, is also inapplicable on its facts. There a claimant sought to establish the existence of an oral lending agreement by testimony of a third party and by the introduction of checks drawn by him payable to the decedent and allegedly endorsed by the decedent. The administrator under oath denied on information and belief the genuineness of the signature of the decedent as an endorser. The Appellate Court held that the denial destroyed all legal presumptions as to the authenticity of the signature and that the checks were improperly admitted because no foundation was laid. Here the evidence presented at trial established the authenticity of the signature and the delivery of the notes.

The administrator next contends that the claimant was incompetent to testify that the indebtedness was not repaid. Since the notes themselves and the letter from the deceased substantially established the accuracy of the amount claimed to be owing, we need not consider whether the claimant was competent to testify.

It is finally contended that the trial court improperly struck Count I of the Counter-Claim which sought the declaration of a resulting trust for certain parcels of vacant real estate that were held in the name of the claimant, but were allegedly owned by the decedent. It is established in the record that there

is a case pending in the Chancery Division of the Circuit Court between the same parties, involving the same issues, and seeking the same relief as in Count I of the Counter-Claim. In view of this fact we fail to see how the administrator was prejudiced by the dismissal of Count I. Since the administrator was not prejudiced, we need not consider whether the trial judge erred or abused his discretion when he dismissed Count I.

The judgment of the Probate Division of the Circuit Court is therefore affirmed.

AFFIRMED.

ADESKO, P. J. and DIERINGER, J.
CONCUR (Abstract only)

53852

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

CRUZ GARCIA TORRES,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Hon. Reginald J. Holzer, Judge Presiding.

MR. PRESIDING JUSTICE McNAMARA DELIVERED THE OPINION OF THE COURT.

Defendant, Cruz Garcia Torres, was charged with the crime of murder. On December 28, 1967, defendant appeared in court, withdrew his plea of not guilty and entered a plea of guilty to that charge. The plea of guilty was accepted by the trial judge, and a sentence of 15 to 25 years in the penitentiary was imposed. Defendant appeals contending that the procedures employed by the trial court in accepting the plea were defective, and that these defective procedures constituted a denial of due process.

Before the trial court accepted the plea of guilty in the instant case, the following colloquy occurred:

> DEFENSE COUNSEL: Your Honor, the defendant wishes to withdraw his plea of not guilty and enter a plea of guilty to [the] indictment.
>
> THE COURT: Mr. Torres, before this Court accepts the plea of guilty I must inform you that when you plead guilty to the crime of murder you authorize this Court to sentence you to the penitentiary for no less than 14 years and as long as the rest of your life, and you also empower this Court to sentence you to die in the electric chair.
>
> When you plead guilty you waive your right to a trial by jury. When you plead guilty you do so because in fact you are and not because of any inducements for leniency that may have been advanced to you by your lawyer or the State's Attorney.

> Knowing these things, do you persist in pleading guilty?
>
> DEFENDANT TORRES: Yes.
>
> THE COURT: There will be a finding of guilty as to the indictment.

After that conversation took place, the prosecutor stated what the testimony of the prosecution's witnesses would be, and defendant's counsel stipulated to those facts.

Supreme Court Rule 402, Ill. Rev. Stat. (1967) ch. 110, §402 provides as follows:

> In hearings of pleas of guilty, there must be substantial compliance with the following:
> (a) The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
> (1) the nature of the charge;
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior conviction or consecutive sentences;
> (3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and
> (4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.

See also Ill. Rev. Stat. (1967) ch. 38, §115-2.

The record reflects that the trial court more than adequately informed defendant of the nature of the charge, the consequences of his plea and the possible penalties provided by law in the event of acceptance of his plea of guilty. However, defendant argues that there is no showing that he understood the information conveyed to him by the court.

Absent other qualifying facts we must conclude that defendant understood the import of the admonition in making his affirmative response to the trial court. Had the form of the trial judge's inquiry allowed defendant to make separate responses to the recitation of each right or waiver, the need for review of the trial court's procedure might well have been eliminated. However,

nothing in the record suggests that there was any confusion or lack of understanding on the part of defendant in his affirmative response to the trial judge's inquiry. In People v. Mims, 42 Ill. 2d 441, 248 N.E. 2d 92 (1969), the court found that defendant understood the information given to him by the trial judge as to his plea of guilty. In that case, defense counsel advised the court that defendant wished to plead guilty and described the advice that he had given defendant as to the possible consequences of that plea. In response to the trial judge's inquiry defendant said that he understood that his plea of guilty waived his right to a jury trial. The trial judge then advised him of the possible penalties, asked defendant if he still persisted in his plea of guilty, and defendant answered, "Yes". The Supreme Court held that nothing in the record suggested that "defendant's affirmative response to this question was unintended or in any way equivocal." (p. 444). Similarly, in the instant case we find that there was a sufficient showing that defendant understood the information given to him by the trial judge.

Relying on McCarthy v. United States, 394 U.S. 459 (1969), defendant also argues that the manner in which the plea of guilty was accepted in the instant case constituted a failure to meet the minimum requirements of due process. In McCarthy the United States Supreme Court ruled that a conviction based upon a guilty plea in a federal court had to be reversed for failure of the trial court to comply with Rule 11 of the Federal Rules of Criminal Procedure. That rule and the McCarthy decision emphasized the importance of personal inquiries addressed to the defendant to ascertain directly his understanding of the nature of the charge against him. However, in People v. Mims, supra., our Illinois Supreme Court held that procedures very similar to those employed in the instant acceptance of the plea of guilty were

sufficient to satisfy the constitutional requirements of due process. Moreover, the McCarthy decision has been held not to apply to any case tried before April 2, 1969. Holliday v. United States, 394 U.S. 831 (1969). See People v. Williams, 44 Ill. 2d 334, 255 N.E. 2d 385 (1970).

Accordingly, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

DEMPSEY and McGLOON, JJ., concur.

55225

133 I.A.2 204

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. ROBERT ENGLEHORN, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Daniel J. Ryan, Presiding.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

ABST.

Defendant pleaded guilty to an indictment for involuntary manslaughter arising from reckless driving of an automobile. C 38 §9-3(b). The indictment, in other counts, also charged reckless driving (C 95-1/2 §145(a)); failing to stop at certain stop signs (C 95-1/2 §183(b)); driving too fast for conditions (C 95-1/2 §146(a)) and criminal damage to property (C 38 §21-1(a)). The facts were stipulated in the trial court. At that time, defendant was 18 years old. The court sentenced him to a penitentiary term of one to three years. His only contention is that the sentence is excessive and that this court should reduce the punishment to a period of probation.

At the trial it was stipulated that defendant had no criminal record. Apparently this was one of the factors which motivated the trial judge to impose the minimum sentence. People v. Miller, 266 N E 2d 427. However, during May of 1967, defendant was in some manner involved in automobile theft and was committed to the Illinois Youth Commission. He was detained in the Sheridan Training School for Boys for eighteen months.

This court has power to reduce the punishment imposed by the trial court. Supreme Court Rule 615(b)(4). But, we may exercise this power only where it is manifest from the record that the term imposed is excessive and not reasonably justified. Punishment should be reduced by this court only with considerable

caution in a proper case where the penalty is actually a great departure from the spirit and purpose of fundamental law. People v. Eubank, 46 Ill 2d 383, 394; People v. Taylor, 33 Ill 2d 417, 424; People v. Turner, 129 Ill App 2d 24, 26; People v. Cecil, 128 Ill App 2d 86, 89; People v. Holmes, 127 Ill App 2d 209, 214 and People v. Glasgow, 126 Ill App 2d 82, 90.

On oral argument, able counsel for defendant referred us to a decision in which the Appellate Court for the Fifth District of Illinois reduced a sentence of three to ten years in the penitentiary to a term of probation without incarceration. People v. McClendon, 265 N E 2d 207. The decision is inapplicable here. In McClendon, defendant pleaded guilty to a theft of $750.00. She agreed to make restitution. She was the sole support of three minor children. She had no prior arrests or convictions. The circumstances differ sharply in the case at bar where defendant by his plea has admitted reckless conduct which resulted in homicide. We agree with the spirit of the decision cited and with the result reached. However, we cannot apply the same principles to the completely different facts presented by the instant case.

We have reexamined the other decisions of the Supreme and Appellate Courts of this State filed since promulgation of the rule authorizing reduction of punishment. We are unable to find any stated principle which would authorize us to reduce the punishment here.

The facts shown, particularly those which appear from a psychiatric evaluation of defendant, constitute a strong and eloquent appeal for sympathy and mercy. Factors of this type are present, to varying degrees, in almost every criminal case. However, these feelings cannot authorize us to substitute our judgment for that of the trial judge who had superior opportunities to evaluate the entire situation. The trial

court saw fit not to place defendant on probation and instead he imposed the minimum sentence permitted by law. We have no alternative but to affirm the judgment and sentence as entered. Accordingly the judgment and sentence appealed from are affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J. and LYONS, J. concur.

55273-55274

PETER L. SWANO, Plaintiff-Appellee, vs. JULIA HELEN SWANO, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Honorable Glenn T. Johnson, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

These are appeals by defendant in a divorce proceeding from orders of the Circuit Court of Cook County denying her petition to vacate a previously entered decree as void for want of jurisdiction over her person and dismissing her petition filed under section 72 of the Civil Practice Act (Ill. Rev. Stats. ch. 110) without hearing. On appeal defendant contends that the Circuit Court's determination that it had jurisdiction was against the manifest weight of the evidence and that dismissal of her petition filed under section 72 was error.

The record indicates that a complaint for divorce on grounds of mental cruelty in which Peter L. Swano was named plaintiff and Julia Helen Swano named defendant was filed in the Circuit Court on June 7, 1968. The case came on for trial and was continued for the taking of further evidence. Thereafter, the case was placed on the dormant calendar. An amended complaint, alleging desertion was filed on March 4, 1969, and following removal of the cause from the dormant calendar, it was set for trial.

Defendant did not appear either personally or by counsel at the trial. Plaintiff's counsel advised the trial court that the parties had agreed that the answer to the original complaint would stand as the answer to the amended complaint. The court heard testimony and received in evidence a stipulation executed by the parties which provided that each of the parties waived all claims to the property of the other, waived the right

to receive alimony, that defendant should have custody of the minor child of the parties and that plaintiff should pay child support in the amount of $150.00 per month. A decree for divorce incorporating the terms of the stipulation was entered on March 26, 1969.

On October 16, 1969, plaintiff filed a petition to modify the decree in which he sought custody of the child. Defendant responded by filing a special limited appearance for the purpose of contesting the jurisdiction of the court over her person and also filed a petition seeking to have the decree vacated as void for want of such jurisdiction. Relevant portions of the petition contained allegations that she had not been served with process and that the pro se appearance which appears in the file and bears her name was not executed by her.

Filed with the petition was the affidavit of one Linton Godown, a questioned document examiner, to the effect that he had compared the signature which appears on the pro se appearance with several undisputed exemplars of defendant's signature. As a result of these comparisons he had formulated an opinion that the signature which appears on the pro se appearance is not that of the defendant, but represents an attempt to copy her signature.

A hearing was had on the petition to vacate at which defendant testified that she appeared at the office of plaintiff's attorney and signed the answer and stipulation which appear in the file but she did not sign an appearance. She further testified that it was her intent that the question of whether a divorce should be granted be submitted to a judge for determination. Defendant also presented Linton Godown as a witness. His testimony at the hearing was substantially the same as the averments of his affidavit.

Plaintiff presented one witness, Jorja Johnson, who

testified that she was employed as secretary to plaintiff's attorney and in such capacity she prepared the answer, stipulation, and pro se appearance. She also testified that defendant appeared at her place of employment and signed each of the documents.

Defendant contends that the finding of the trial court that it had jurisdiction over her person was against the manifest weight of the evidence. We do not agree. Defendant admits having signed the answer and stipulation prepared by plaintiff's counsel. Further, she testified that it was her intention that the question of whether a divorce should be granted be submitted to the court. Under these circumstances we believe the defendant must be deemed to have authorized plaintiff's attorney to perform the physical task of filing the stipulation and answer for her and to have submitted to the jurisdiction of the court. The filing of an answer to a complaint itself constitutes a general appearance and thus the jurisdiction of the court over her person was established under the general proposition that any action by a litigant other than to contest jurisdiction constitutes a general appearance which resolves questions of jurisdiction of the person. [See People v. Estep, 6 Ill. 2d 127, 126 N.E. 2d 637 (1955)(motion for continuance as general appearance) and Lord v. Hubert, 12 Ill. 2d 83, 145 N.E. 2d 77 (1957)(petition by omitted party in interest to land to be partitioned for leave to intervene as appearance)].

Defendant's brief fails to specify the manner in which she believes the trial court erred in dismissing her section 72 petition. Since the dismissal was without hearing on the merits of the petition, we consider the issue on appeal to be limited to consideration of the question of whether the petition was so defective on its face as to be incapable of supporting an order

for the relief prayed.

A petition under section 72 is in the nature of a new action and, as in any civil case, the petition must allege a cause of action, i.e., establish petitioner's right to relief, or it is subject to dismissal. Fennema v. Vander Aa, 42 Ill. 2d 309, 247 N.E. 2d 409 (1969).

The instant petition alleges that defendant was not given proper notice by plaintiff of the progress of the case, including notice of the dates set for trial and entry of the decree. However, the petition does not allege that defendant was in fact unaware of the progress of the case nor is any attempt made to excuse her own failure to ascertain the status of the case despite her knowledge of its existence.

Moreover, the petition does not contain allegations of fact sufficient to constitute a defense to the original action. The only allegation of fact directed to this requirement is the unadorned assertion that plaintiff left defendant. We find the petition to be so defective as to be incapable of supporting an order for the relief prayed. Accordingly the order of dismissal is affirmed.

ORDER AFFIRMED.

BURKE, P.J. and GOLDBERG, J., concur.

53666

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. WILLIE BUFORD, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Francis T. Delaney Presiding.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

Defendant was indicted for rape. C 38, §11-1. Upon a jury trial, a verdict of guilty was returned and defendant was sentenced to a term of 75 to 125 years. He contends here: 1) that the trial court erred in denying motions to suppress physical evidence; 2) that a defense witness was improperly impeached by the prosecution on a collateral matter prejudicial to defendant; and 3) that the sentence is excessive.

The rape occurred on February 18, 1967. The victim, then seven years of age, testified that at approximately 6:30 p.m., when it was dark, she went to a store to purchase a soft drink. On her way home, she noticed someone following her. This person took out a knife, held it at her throat and brought her into the rear basement stairwell of a three-story apartment building at 1273 North Wolcott, in Chicago, where he raped her. The victim then had a bowel movement in the basement. The assailant left and returned a few minutes later with a roll of toilet tissue paper which the victim used. He then performed two more acts of sexual intercourse. The assailant then took the child to the door of the basement and left.

The victim was discovered by the police at approximately 8:30 p.m. that same evening. She gave the police a description of her assailant indicating that he was a young male Negro five feet ten to six feet tall. She also said that he was wearing a brown knee-length jacket with a white lining and that he was carrying a knife. She was taken to County Hospital where she was treated and hospitalized.

The investigating officers, Barrett and Lorenz, talked with Mrs. Flora Watkins, sister of the defendant, who resided with her husband in the first floor apartment of the building in question. She told them that she had a twenty-two year old brother, the defendant Willie Buford, who lived with her. She gave the officers a description of her brother which was similar to that provided by the victim. When asked where he might be found, Mrs. Watkins said he was probably at a certain local tavern. The police officers did not question any of the other residents of the building.

Proceeding to this tavern, which catered primarily to a Porto Rican clientele, the police observed a single male Negro. They approached and asked him for his identification. Upon learning that he was Willie Buford, they asked him to step outside. At this point, they considered Buford to be under arrest. The arrest occurred at approximately 1:00 a.m. February 19, 1967. Buford was taken to the Maxwell Street Police Station where he was searched. His trousers and underclothes were taken from him. The undershorts were stained with blood and fecal matter. Scientific testimony showed that the blood was the same type as that of the victim and differed from that of defendant.

At approximately 10:00 p.m. that day, the two investigating officers returned to the Watkins' residence. Mrs. Watkins recognized them as the detectives who had been there the night before. Officer Barrett told Mrs. Watkins that her brother had confessed to the rape which had occurred in the building. He told her that they had come for the clothes which her brother had been wearing the night before. Mrs. Watkins then said, "Wait I'll get them." She went into defendant's room and returned with the items requested. At no time did the police officers leave the living room of the apartment and enter defendant's room. A corduroy fleece-lined three-quarter length jacket, a shirt, belt, trousers and knife were given to the officers by Mrs. Watkins.

Uncontradicted scientific evidence showed that defendant's jacket was stained with human blood and with fecal matter. His trousers and belt had similar stains. The blood was the same type as that of the victim, differing from that of defendant. A small piece of toilet tissue paper was adhering to the end of the belt. A motion to suppress the introduction of these items into evidence was denied by the trial court. No search warrant for the apartment had been issued.

Defendant first argues that since the events leading up to his arrest did not establish reasonable grounds that he had committed a crime, his arrest and subsequent search were unlawful. Defendant maintains that he was arrested not because the police officers had probable cause to believe he had committed a crime but merely because he happened to live in the immediate area. He argues, therefore, that the arresting officers acted on suspicion rather than probable cause so that his arrest and subsequent search were illegal.

The United States Supreme Court has had occasion to consider what constitutes probable cause for arrest. In Brinegar v. United States, 338 U S 160, the Court said at page 175:

> "Probable cause exists 'where the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

The Illinois Supreme Court has adopted this definition of probable cause and in People v. McCrimmon, 37 Ill 2d 40 at page 43 stated:

> "Probable cause for arrest exists when the facts and circumstances within the arresting officer's knowledge, and of which he had reasonable and trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in believing that an offense had been committed, and that the person arrested is guilty."

The court concluded that "whether probable cause existed depends upon the totality of the facts and circumstances in a given case." We shall, therefore, examine the "totality of the facts and circumstances" surrounding the arrest to determine whether probable cause existed.

Officers Barrett and Lorenz knew that the person who had committed the rape was a young male Negro between five feet ten and six feet tall. They also knew that the rape had taken place in the basement stairwell. This specific location would reasonably indicate to the officers that the assailant was familiar with the building and knew he would not be disturbed during commission of the crime. The fact that defendant lived in the building is a pertinent fact of prime importance. The arresting officers also knew that the victim lived in the immediate neighborhood. Thus, examining the totality of the facts and circumstances known to the police officers at the time of the arrest, we are impelled to conclude that they had probable cause to believe that the defendant had committed the crime of rape and consequently the arrest was lawful. Brinegar v. United States, 338 U S 160, 175; People v. Hester, 39 Ill 2d 489, 513; People v. McCrimmon, 37 Ill 2d 40, 43; People v. Coleman, 127 Ill App 2d 38, 44; People v. Ramirez, 124 Ill App 2d 407, 411.

Predicated upon this conclusion, we find nothing improper in the subsequent search of defendant and the seizure of his undershorts and trousers. A search of defendant's person incident to a lawful arrest is constitutionally permissible and the items seized as a result of this search are admissible at trial. United States v. Rabinowitz, 339 U S 56, 60; People v. Bambulas, 42 Ill 2d 419, 422; People v. Hanna, 42 Ill 2d 323, 328; People v. Ramirez, 124 Ill App 2d 407, 411. Furthermore, as pointed out by the State, the arresting authorities are under a statutory duty to search prisoners prior to confinement. People v. Ambrose, 84 Ill App 2d 128, 133 citing C 75 §§18, 22.

The cases cited by defendant to support his proposition that Officers Barrett and Lorenz did not have probable cause to arrest him are inapplicable. In People v. Galloway, 7 Ill 2d 527, the court found a lack of probable cause where the only basis for arresting defendant was that he was standing next to a person who had been implicated in a crime by a police informer. The defendant had not been named by the informer prior to his arrest.

In People v. Beattie, 31 Ill 2d 257, the court reversed defendant's conviction on the theory that the defendant was arrested solely because he was a known user of narcotics. The court found that the arresting officers did not know whether defendant possessed narcotics until he was arrested and searched.

In Henry v. United States, 361 U S 98, federal agents arrested the defendant merely because he was loading unidentified cartons into his car. The agents had received information prior to the arrest that defendant was engaged in interstate shipments. The court held that these facts alone were insufficient to give the arresting agents probable cause to believe that defendant had committed a crime.

The defendant cites Morales v. New York, 396 U S 102 for the proposition that "the sole fact that one is a frequent visitor in a building in which a crime has been committed is not enough to create probable cause to make an arrest." However, in the instant case, defendant was not merely a frequent visitor to 1273 North Wolcott but was a permanent resident. Further the crime in question was not committed in a public elevator as in Morales but rather in an enclosed, hidden basement stairwell of defendant's residence. Additionally, the victim gave the police a fairly detailed description of her assailant. These factors distinguish Morales.

In the instant case, a crime had undoubtedly been committed and the arresting officers had sufficient evidence to create a reasonable belief that defendant was guilty. They, therefore, had probable cause to arrest defendant and take him into custody for the commission of this crime.

Defendant's second contention is that the search of his room some twenty hours after his arrest without a search warrant and without his consent was invalid. Defendant argues that Mrs. Watkins was coerced and intimidated by the presence of the police officers in her apartment and did not freely consent to the search. Further, defendant maintains, Mrs. Watkins was not authorized to consent to the search of his room. Defendant indicates that since he paid $15.00 for the use of the room and

since Mrs. Watkins entered his room only to clean and collect his laundry, he was entitled to the exclusive possession of this room. We find these contentions without merit.

The testimony of Mrs. Watkins demonstrates that she produced defendant's clothing, belt and knife voluntarily at the request of the two police officers. The police did not order Mrs. Watkins to procure these articles but merely told her they had come after the clothes defendant had been wearing the night before. Once the officers indicated their purpose, Mrs. Watkins voluntarily went to defendant's room and removed various articles of clothing specified by the police officers. At no time did the police attempt to enter defendant's room. Neither did they order Mrs. Watkins to give them defendant's clothing or threaten her with force if she refused to do so. Whether consent has been given in a particular case is a factual question to be determined by the trial court and the finding will stand unless it is clearly unreasonable and against the manifest weight of the evidence. People v. Armstrong, 41 Ill 2d 390, 396; People v. Speice, 23 Ill 2d 40, 45; People v. Thomas, 120 Ill App 2d 219, 222. The trial court, after hearing the evidence with regard to the motion to suppress, found that Mrs. Watkins had freely consented to the search and that this consent was voluntary and not coerced. We cannot say this finding is so unreasonable as to be against the manifest weight of the evidence.

The defendant cites People v. Haskell, 41 Ill 2d 25 to indicate that consent to a search may be invalid because it was the product of implied coercion. In Haskell, the police officers, early in the morning, went to defendant's apartment and ordered his wife to give them the gun in question, indicating they had been sent to obtain the pistol and that her husband was "trying to help us." People v. Haskell, 41 Ill 2d 25 at page 29. The court found that the wife had not freely consented to the seizure of the weapon, having been intimidated by the aggressive attitude

of the police officers. In the instant case, to the contrary, the police did not order Mrs. Watkins to "get the clothing" and she in fact volunteered to go into defendant's room for the clothes in question. There was no evidence of intimidation or coercion and the trial court was correct in finding that Mrs. Watkins freely consented.

Defendant maintains, however, that Mrs. Watkins lacked authority to consent and to deliver his property to the police. Defendant argues that since Mrs. Watkins did not have an equal right to the use and possession of his room, she could not consent to a search of this room.

The rule is well established that a person other than a defendant may have authority to consent to a search of premises occupied jointly with defendant, and a search pursuant to that consent is not an unreasonable search constitutionally prohibited. People v. Walker, 34 Ill 2d 23, 28; People v. Speice, 23 Ill 2d 40, 43; People v. Perroni, 14 Ill 2d 581, 590; People v. Thomas, 120 Ill App 2d 219, 222. Evidence at the hearing on the motion to suppress clearly shows that Mrs. Watkins had a possessory interest in the premises which would give her the authority to consent to a search. She was the homemaker of the apartment. She cooked for defendant, cleaned his room, made his bed and went into his room to collect his laundry. She had access to defendant's dresser and frequently entered his room to obtain cigarettes from his clothing. No evidence was presented which would indicate that defendant ever attempted to exclude his sister from his room. From these facts we conclude that Mrs. Watkins had authority to enter defendant's room and secure the items requested by the police officers.

Defendant relies upon Beach v. Superior Court, County of San Diego (Cal App), 90 Cal Rptr 200 (1970) on the issue of authority of Mrs. Watkins. In Beach, the defendants lived with their sister, Mrs. Nichols who gave police officers permission for the search. However, in Beach, no evidence was presented to indicate the extent of Mrs. Nichols' possessory interest in

her brothers' bedroom. Therefore, the court was justified in finding that Mrs. Nichols did not possess the authority to consent to the search. In the instant case, ample evidence was presented to permit the trial court to determine that Mrs. Watkins had the authority to consent to a search of defendant's room since she had an equal right to the use and possession of the premises. The motion to suppress was properly denied.

Defendant's next point on appeal is that the trial court erred in permitting the prosecution to impeach Mrs. Watkins on recross-examination. This contention is without merit. The record indicates that on redirect-examination defense counsel asked Mrs. Watkins: "Do you think that Willie raped this girl?" to which she replied: "No, I don't." Thereupon, on recross-examination, the State's attorney asked Mrs. Watkins: "Did you tell the police officers on February 19 that you thought Willie raped this girl?" She responded: "No." At this point, there was an objection by defense counsel and a conference in chambers after which the question and answer were allowed to stand. In continuing the recross-examination, the State's attorney asked a similar question as to whether Mrs. Watkins told the officers that she suspected that her brother had committed the rape and received a negative reply.

It is an elementary rule of evidence that a witness in a criminal prosecution may be cross-examined upon any matter going to explain, modify or discredit what was said upon direct examination. People v. Nastasio, 31 Ill 2d 51, 58; People v. Sevastos, 117 Ill App 2d 104, 113; People v. Garner, 91 Ill App 2d 7, 15. Defendant's attorney first opened the door to the subject matter by asking Mrs. Watkins whether she thought Willie Buford had committed the rape. The defense, having initiated this inquiry, cannot now argue that the questions on recross-examination were improper. People v. Ridener, 129 Ill App 2d 105, 107. These questions were entirely within the scope of the redirect-examination. The trial judge was correct in overruling defendant's objection and permitting the questions to be answered by Mrs. Watkins.

One general observation is pertinent here. Defendant's counsel wisely raised no point on the sufficiency of the evidence to prove guilt beyond reasonable doubt. The evidence of guilt in this record is truly overwhelming despite a weak and transparent attempt by members of defendant's family to assist him by their testimony. The record shows that a witness for the State identified the child as having entered his grocery store to purchase soft drinks and the defendant as having entered some time later to purchase a roll of toilet tissue. Upon this entire record, eliminating and disregarding all evidence challenged upon constitutional or other grounds, it is difficult to conceive of any reasonable jury or other trier of fact which could arrive at any verdict or finding other than guilt beyond a reasonable doubt. If there was error, it did not contribute to the verdict of guilty. It has been correctly and properly held that the commission of error of constitutional dimension at the trial does not necessarily require reversal of the judgment. See the opinion by Mr. Justice Lyons of this court in People v. Rush, 126 Ill App 2d 136, 142 and additional authorities there cited. See also People v. Ridener, 129 Ill App 2d 105, 108; People v. Thompson, 128 Ill App 2d 420, 426; People v. Owens, 126 Ill App 2d 379, 383 and People v. Landgham, 122 Ill App 2d 9, 24. It is our carefully considered opinion that the verdict and judgment of guilty as rendered in this case must be affirmed.

We now turn to the final point raised by defendant regarding the sentence. The rules of the Supreme Court permit this court "to reduce the punishment imposed by the trial court." 43 Ill 2d Rule 615(b)(4). In interpreting this rule, the Supreme Court and this court have consistently held that before a reviewing court should interfere with the sentence it must be manifest from the record that the term imposed is excessive and not justified by any reasonable view. We may exercise this power to reduce the sentence only with considerable caution in a proper case where the penalty constitutes a great departure from the spirit

and purpose of fundamental law. People v. Eubank, 46 Ill 2d 383, 394; People v. Taylor, 33 Ill 2d 417, 424; People v. Turner, 129 Ill App 2d 24; People v. Cecil, 128 Ill App 2d 86; People v. Holmes, 127 Ill App 2d 209 and People v. Glasgow, 126 Ill App 2d 82, 90.

This defendant was 22 years old at the time of commission of this offense. Defendant had never been convicted of any crime and was never previously arrested. He was born in Mississippi, where he went to school until the third grade. At age 13, he left school and his education terminated. He has been employed since the age of 7 when he started to work on a farm. He is virtually illiterate and can read and write "a little." He suffered a blow on the head when quite young which "put a hole in the head for awhile." He also has alcoholic tendencies and has been drinking since he was very young. He has a good work record and seems to have some family ties and loyalties. He has been living with his sister since he came to Chicago in October of 1966.

All of these matters raise grave and abiding doubts regarding the sentence imposed by the court of an indeterminate term from 75 to 125 years. "The fact that defendant has no criminal record is a significant factor" in this regard. People v. Miller, 266 N E 2d 427, 430. Let us first consider the minimum sentence. At the time of this offense, February 18, 1967, the statutory minimum penalty for rape was one year. (S H A, C 38, §11-1(c)). By act approved September 1, 1967, which was before defendant was tried, the legislature increased the minimum penalty for rape to four years. C 38, §11-1; Ill Rev Stats Vol I P.1600. Defendant was entitled to be sentenced under the law as it existed at the time of the offense. People v. James, 46 Ill 2d 71. Therefore, the minimum penalty assessed is 75 times greater than the statutory minimum. In People v. Lillie, 79 Ill App 2d 174 at page 178, the court stated the purpose of imposing sentence as:

> "The purposes sought to be achieved by the imposition of sentence are adequate punishment for the offense committed, the safeguarding of society from further offenses, and the rehabilitation of the offender, into a useful member of society."

Immediately following the above language, the court stated that adequacy of the punishment should determine the minimum sentence. The Advisory Council of Judges of the National Council on Crime and Delinquency has published a Model Sentencing Act. Section 8 of this Act suggests a minimum term of 10 years or less for atrocious crimes such as forcible rape. Comments to section 9 of this Act mention excessive use of long terms as, "one of the characteristics of American sentences."

In addition, fixing the minimum sentence at 75 years is a useless act. Under the applicable statute, every person confined to a penal institution is eligible to parole after "20 years less time credit for good behavior." C 38, §123-2(3). This means that despite the stated sentence of 75 years, this defendant will be eligible for parole after serving 11 years and 3 months, assuming good behavior. It is true that defendant stands convicted of a heinous and atrocious crime. But, in view of the pertinent statute, a minimum sentence of 75 years is classic futility. We, therefore, conclude that the minimum sentence should be reduced to 20 years. This is not actually a reduction of the minimum sentence but it is merely a rational recognition of the effect of the applicable statute.

In Lillie, the court expressed the opinion that the maximum sentence should be, "dependent upon the court's divination as to the length of time required to achieve rehabilitation." 79 Ill App 2d at page 178. In this type of case, the expressed standard imposes a difficult and perhaps impossible burden upon the court. No person can predict to any degree of certainty the effect upon this defendant of service of his minimum term. The maximum of 125 years imposed in this case would appear to us to operate as a discouragement and a deterrent to good conduct while in custody and to effective rehabilitation. It is important that sentences should not have a narrow spread but the disparity between minimum and maximum should be reasonable to encourage and promote good behavior. See People v. Thomas, 127 Ill App 2d 444, 456. Upon careful consideration of all of

these pertinent factors, it is our opinion that the maximum sentence should be reduced to 40 years.

Accordingly the judgment and sentence are modified to provide that the sentence is reduced to a term of not less than 20 years and a maximum of 40 years and the judgment is affirmed as modified.

JUDGMENT AFFIRMED AS MODIFIED.

BURKE, P. J. and LYONS, J. concur.

55461

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
v.	)	
ALLEN RATLIFF, Defendant-Appellant.	)	HONORABLE FRANK J. WILSON, PRESIDING.

MR. JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

On June 19, 1968, on defendant's plea of guilty to the charge of armed robbery he was placed on probation for five years with the first year to be served in the State Farm at Vandalia. During that trial it was stipulated that defendant and another person robbed a cab driver of $33 and that a gun was used in perpetrating the crime. On February 13, 1970, a rule to show cause why probation should not be terminated was filed. On May 4, 1970, defendant appeared before the trial court charged with violation of the conditions of his probation in that he failed to report to the Probation Department (in December 1969 a warrant for violation of probation was ordered) and that on January 15, 1970, he was convicted of theft, after a bench trial. Based on these violations the trial court ordered defendant's probation revoked and sentenced him to serve two to four years for the armed robbery.

The Public Defender, who represents defendant in this appeal, has requested that he be allowed to withdraw as appellate counsel. In his supporting brief, filed pursuant to Anders v. California, 386 U.S. 738, he asserts that the only possible basis for an appeal would be whether or not the sentence imposed was excessive. The Public Defender concludes that the sentence of two to four years is not excessive.

The defendant was notified of his counsel's motion to withdraw and was given two and one-half months to file additional points in support of his appeal. He has not responded.

We have reviewed the record, including the hearing in aggravation and mitigation held after defendant's probation was revoked,[1] and find that the trial court adhered to the requirements of Illinois Revised Statutes, 1967, ch. 38, §§ 18-2 and 117-3(d)[2] and the cases which set forth the standards for determining whether a sentence is excessive. People v. Miller, 33 Ill.2d 439, and People v. Taylor, 33 Ill.2d 417.

We conclude that there are no legal points arguable on their merits and that an appeal would be wholly frivolous and could not possibly be successful. We agree with the Public Defender that since the minimum sentence of two years is the minimum allowed by statute for the offense of armed robbery, the sentence of two to four years is not excessive. The motion to withdraw is allowed and the judgment is affirmed.

AFFIRMED

English, P.J., and Lorenz, J., concur.

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1. The State therein indicated that defendant had been sentenced to nine months at the State Farm at Vandalia on April 29, 1968, for the offense of criminal trespass to vehicle.

2. 18-2 Armed Robbery
(b) Penalty
A person convicted of armed robbery shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than 2 years.

117-3 Violation of Probation
(d) If the court determines that a condition of probation has been violated, the court may alter the conditions of probation or imprison the probationer for a term not to exceed the maximum penalty for the offens of which the probationer was convicted.

ABSTRACT

54883

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

ROBERT BARBER,
Defendant-Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Hon. James D. Crosson,
Presiding.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was indicted for the offenses of theft of property having a value in excess of $150 and of violation of his bail bond (commonly known as "bail jumping.") He entered a plea of guilty to each charge on March 4, 1969. After a stipulation of the evidence the trial court found defendant guilty as charged in each indictment and, after a hearing in aggravation and mitigation, defendant was placed on probation for a period of five years. Conditions of his probation were that he make restitution of the amount taken in the theft at the rate of $50 per month, and that he not leave the jurisdiction of the court without permission from the court.

On December 2, 1969 defendant was brought before the trial court on a rule to show cause why his probation should not be revoked, on the grounds that he had left the jurisdiction of the court without permission, that he had been convicted of crimes in Ohio during the term of probation, and that he failed to make the restitution payments. The trial court found the defendant guilty of violating his probation, revoked defendant's probation and sentenced him to a term of two years to six years in the penitentiary on the theft conviction and to a term of one year to two years on the violation of the bail bond conviction, the sentences to run concurrently.

On appeal defendant contends that he was denied the right to a hearing in aggravation and mitigation at the hearing on the rule

to show cause, and further that the sentences imposed were excessive.

As noted above, a hearing in aggravation and mitigation was held at the time defendant pleaded guilty to the two offenses in March 1969. The record reveals that the circumstances of defendant's leaving the jurisdiction of the court and of his failure to make the required restitution payments were before the court at the hearing on the rule to show cause. The record further reveals that the court, at the conclusion of the evidence at the hearing on the rule to show cause inquired of counsel whether they had "anything else to offer." Under the circumstances there was no necessity to hold another hearing in aggravation and mitigation. See People v. Williams, _____Ill. App. 2d ___, 264 N.E. 2d 589, 593.

As to the question of the excessiveness of the sentences imposed, the trial court had heard evidence in aggravation and mitigation, and the sentences were within the limits set by the statute. See Ill. Rev. Stat. 1969, Chap. 38, Paras. 16-1 & 32-10.

For these reasons the judgments are affirmed.

JUDGMENTS AFFIRMED.

LYONS and GOLDBERG, JJ., concur.

55201

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. ANGELO CRUZ, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Frank J. Wilson, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

After revocation of a five year probation, defendant was sentenced to serve one to two years in the Illinois State Penitentiary. The sole issue in this appeal is whether the sentence was imposed on the basis of the original offense as required by law.

On April 9, 1969, the defendant was indicted for the offenses of attempt burglary and possession of burglary tools. Defendant subsequently pleaded guilty to the offense of possession of burglary tools and, on motion of the State, the charge of attempt burglary was stricken with leave to reinstate (S.O. L.). A hearing in mitigation and aggravation established that the defendant had been convicted of theft in January 1969 and had been placed on probation for one year. Defendant was then sentenced to five years probation on the possession of burglary tools conviction.

On September 16, 1969, the court was advised by written report from the Probation Department that defendant had violated his probation in that defendant had been convicted of theft on September 8, 1969, and had been sentenced to serve thirty days in the House of Correction. On October 3, 1969, the court modified its sentence of five years probation for the possession of burglary tools conviction to include a condition that the first five months of probation be served in the House of Correction. On May 26, 1970, the Probation Department advised the court by

written report that defendant had again violated his probation in that he had been convicted of criminal damage to property on April 24, 1970, and had been sentenced to serve ninety days in the House of Correction. A rule to show cause why probation should not be terminated was issued by the court.

At the revocation of probation hearing on June 2, 1970, the Probation Department advised the court that defendant was placed on five years probation after conviction for possession of burglary tools on May 28, 1969. The court was also advised that on April 24, 1970, defendant was convicted of criminal damage to property and had thereby violated his terms of probation. Defendant did not contest the report by the Probation Department and a finding of violation of probation was entered. The court then proceeded to hear matters in aggravation and mitigation during which the Assistant State's Attorney made the following remarks:

> In aggravation, your Honor, the State would inform the Court that the conviction on which the violation is before the Court was an attempt burglary where the defendant was found on the back porch of a private residence with burglary tools, arrested at that location. Also inform the Court of the defendant's prior record which the Court is aware of. For the record the defendant was convicted of theft, which was burglary reduced to theft in January, 1969, placed on one year probation, terminated unsatisfactory. After your Honor placed him on probation for attempt burglary. Based upon this the defendant having a record of burglaries reduced to theft, the State recommends one to two, which of course the Statute provides.

The court then asked if it had ever sentenced the defendant for violation of probation and the Assistant State's Attorney replied: "You did. I believe you gave him five months in the House of Correction and this was for an attempt burglary." The court next heard evidence in mitigation which primarily consisted of a petition by defendant that he be treated as a narcotic addict under the Drug Addiction Act. Defendant's petition was denied

and he was sentenced to not less than one nor more than two years in the Illinois State Penitentiary.

On appeal, defendant contends for a modification of his sentence because the prosecution erroneously stated certain facts during the hearing in mitigation and aggravation. Defendant suggests that his sentence was not based on the offense of possession of burglary tools, for which he was originally convicted, but rather on the offense of attempt burglary, a crime of which he was never convicted. He supports this argument with direct references to the erroneous statements made by the prosecutor in aggravation. We have set out the prosecutor's remarks above and agree that the prosecutor erroneously characterized the nature of defendant's original conviction. If, therefore, there is evidence that the court relied upon this erroneous information when it imposed sentence, the sentence may not stand. A probationer who has had his probation revoked can be sentenced only for the offense of which he was convicted and for which the probation was granted. When his probation is revoked, it is the nature of that initial offense which is relevant to the sentence to be imposed. People v. Livingston, 117 Ill. App. 2d 189, 192, 254 N.E. 2d 64 (1969).

We have carefully examined the entire record in this cause and believe that several factors are highly relevant to a just disposition of the case. First, we note that each of the written reports from the Probation Department to the court specified that defendant was convicted in May 1969 for possession of burglary tools. Second, at the commencement of the probation revocation hearing, the court was advised by a representative of the Adult Probation Department that defendant was before the court for violation of the probation which he was given after conviction in May 1969 for possession of burglary tools. Third, the sentence

imposed was precisely that which was provided by Ill. Rev. Stats. (1967) ch. 38, § 19-2 (Possession of Burglary Tools). Finally, there is no indication in either the oral remarks or the written orders of the court that it was under a belief that defendant's conviction was for attempt burglary rather than possession of burglary tools.

Having considered these factors in addition to those suggested by defendant, we are of the opinion that the prosecutor's remarks, although admittedly careless, were not the basis upon which the court relied in sentencing defendant. We believe that the court sentenced defendant only for the offense of possession of burglary tools, and only after a properly conducted hearing in mitigation and aggravation.

For the reasons given the judgment of the trial court is affirmed.

AFFIRMED.

BURKE, P.J. and GOLDBERG, J., concur.

54184 and 54451 Consolidated

ESTATE OF ANNE G. MOELLER, a/k/a Anna G. Moeller, Deceased.

WILLIAM P. McGUIRK, Petitioner-Appellee Cross-Appellant,

vs.

KATHRYN M. NISSEN, THERESA BREWTON, PHILLIP DeFATA and VINCENT DeFATA, Respondents-Appellants,

KATHRYN M. NISSEN, Administratrix of the Estate of Anne G. Moeller, Respondent-Cross Appellee.

and

KATHRYN M. NISSEN, Administratrix of the Estate of Anne G. Moeller, Petitioner-Appellee,

vs.

WILLIAM P. McGUIRK, one of the heirs of the Estate of Anne G. Moeller, Objector-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Honorable James M. Corcoran, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The appeals in this case arose from an order pursuant to findings made by the trial court in connection with the probate of the estate of Anne G. Moeller, deceased.

Anne G. Moeller died intestate on July 19, 1967, leaving her two brothers, Thomas and William McGuirk, as her only heirs-at-law. William McGuirk, a bachelor, was 84 years old at the time of his sister's death. Thomas McGuirk, a widower, was 73 years old at the time and had four stepchildren: Kathryn M. Nissen, Theresa Brewton, Phillip DeFata and Vincent DeFata. Thomas and William McGuirk had lived together for many years in the same residence.

On August 28, 1967, Thomas McGuirk petitioned the court to issue letters of administration to Kathryn M. Nissen and on August 30, 1967, both Thomas and William McGuirk filed an Appearance for Letters of Administration which recited:

> We, heirs of ANNE G. MOELLER a/k/a Anna G. Moeller, deceased, of legal age and under no disability,

> appear, waive notice, and consent to immediate appointment of KATHERINE M. NISSEN as administrator and to the issuance of letters of office.
>
> /s/ Thomas B. McGuirk
> /s/ William McGuirk

The court issued letters to Kathryn M. Nissen on August 30, 1967, and on September 5, 1967, entered an Order Declaring Heirship, which declared William and Thomas McGuirk to be the sole heirs-at-law and next of kin of Anne Moeller. On October 10, 1967, the administrator filed an inventory which showed the valuable assets of the estate to consist of cash savings of $856.19, nine hundred (900) shares of Zenith Radio Corporation common stock worth $61,200.00 and accumulated dividends on the stock worth $7,117.50. On October 16, 1967, the administrator petitioned the court to authorize the filing of a partial assignment of the right of inheritance by Thomas and William McGuirk. That assignment, omitting the caption and Notary Public certification, reads as follows:

> The undersigned, THOMAS B. McGUIRK and WILLIAM McGUIRK, who are the sole surviving heirs of ANNE G. MOELLER, a/k/a ANNA G. MOELLER, deceased, for and in consideration of the love and affection which we bear toward the following named persons, do by this instrument hereby ASSIGN and TRANSFER a ONE SIXTH (1/6th) SHARE of our right of inheritance in the within estate to each of the following persons:
>
> 1. KATHERINE M. NISSEN;
> 2. THERESA BREWTON;
> 3. PHILIP DE FATA;
> 4. VINCENT DE FATA
>
> IN WITNESS WHEREOF we have set our hands to this Assignment at Chicago, on this 11th day of September, 1967.
>
> /s/ William McGuirk /s/ Thomas B. McGuirk

The court ordered that the assignment be filed and spread of record. On May 7, 1967, the administrator's attorney petitioned the court for leave to allow the administrator to deposit the distributive share of William McGuirk with the Cook County Treasurer, pursuant to § 307 of the Probate Act, because William had refused to sign

a receipt for or accept his distributive share of the estate. The petition was granted and a court order issued.

The administrator filed a Final Account on May 15, 1968, to which William McGuirk objected. In a petition entitled "Objections To Final Accounting" William alleged that Kathryn Nissen, the administrator, was attempting to participate in the proceeds of the estate although she was neither an heir nor a descendant of the deceased. The petition further alleged that the administrator had breached her fiduciary duties "by improperly exerting duress and pressure upon Thomas McGuirk to relinquish a portion of the proceeds of the Estate; that by a scheme, devise, subterfuge or conspiracy with her brothers and sisters . . . obtained a document or other paper allegedly giving to one or more of the administratrix' relatives . . . a portion of [William McGuirk's] interests in the . . . estate." Finally, the petition asked that a full investigation and hearing into the activities of the administrator be conducted, that the administrator be removed and another appointed, and that a proper determination of beneficiaries or heirs be made for purposes of correct distribution of the proceeds.

William McGuirk filed a subsequent "Petition" on December 11, 1968, in which he alleged that the assignment he had signed had been fraudulently obtained by the administrator and that he had been subjected to harassment, threats and other abuse by both the administrator and Thomas McGuirk because of his pursuit of his claim. This petition asked that the assignment in question be declared void, that the administrator be removed and that Kathryn Nissen and Thomas McGuirk be enjoined from "any way attempting to coerce, harass, annoy or interfere with the physical or mental well-being of William McGuirk." In her answers to William's two petitions, the administrator denied his allegations and the matter was set down for hearing on February 3, 1969.

The evidence adduced at the hearing established that

shortly before her death, Anne Moeller told Kathryn Nissen that her husband, Charles Moeller, who had died many years earlier, might have had some corporate shares of stock somewhere. After Anne Moeller died, Kathryn Nissen informed Thomas and William McGuirk about the conversation she had with Anne Moeller concerning the stock. William expressed doubt that any such stock existed and repeatedly indicated that he wanted no part of it even if it did exist. Thomas and William then agreed, however, that if anything of value should be found, they would share it equally with Thomas' four stepchildren, i.e., each would receive one sixth of the estate.

A search conducted after Anne Moeller's death revealed that Charles Moeller had been the owner of twenty-five shares of original Zenith Radio Corporation stock which were now equal to nine hundred shares worth more than $60,000.00. Kathryn Nissen had retained an attorney to assist her in the administration of the estate and she apparently requested him to draw an assignment whereby Thomas and William McGuirk could legally transfer portions of their interest in the estate to Thomas' four stepchildren in accordance with their desire to share their inheritances. The assignment was prepared and presented by the administrator to Thomas and William McGuirk for signature. The contents of the assignment were fully discussed and William read the document carefully before signing it. The assignment was notarized by a Notary Public.

With respect to the execution of the assignment, William testified that he did not know what he was signing and that the paper was neither read by nor explained to him. He indicated that he was presented with a folded piece of paper and was told to sign it. He denied ever expressing an intention to relinquish any of his interest in the estate. The detailed testimony of other witnesses was quite contrary.

On April 28, 1969, the court entered a judgment which set aside the assignment as it applied to William McGuirk and supported the judgment upon these findings:

> That WILLIAM MC GUIRK was not aware of nor did he realize the consequences in signing a document which was in fact an assignment of part of his interest in the . . . estate;
>
> The court further finds that the [administrator] abused the confidence reposed in her and did not exercise the care and caution required of her in obtaining the signature of WILLIAM MC GUIRK.

The court refused, however, to remove Kathryn Nissen as the administrator because she was "not guilty of any intentional dishonesty as to the estate" and the court also denied William McGuirk's prayer for injunctive relief.

Kathryn Nissen, Theresa Brewton, Phillip DeFata and Vincent DeFata then appealed the judgment invalidating William McGuirk's portion of the assignment, and William McGuirk cross-appealed the denial of his request to have Kathryn Nissen removed as administrator. While this matter was pending on appeal, the administrator filed a First Current Account to which William McGuirk objected. After conducting a hearing concerning the First Current Account, the court approved it. William McGuirk then appealed from the court's judgment on the First Current Account. Thus, there are two distinct matters to be reviewed by this court: first, we must review the judgment concerning the validity of the assignment and the removal of the administrator [Case No. 54184]; second, we must review the judgment on the First Current Account [Case No. 54451].

Initially, we consider the propriety of the ruling which invalidated William McGuirk's portion of the assignment. The court below found that William McGuirk did not realize the consequences of his signing the assignment and, in addition, that the administrator never informed him of the value of the estate or of what his share would be. On that basis the lower court

invalidated a portion of the assignment.

It is a well established rule that where the evidence is in dispute, and where the judge heard and saw the witnesses testify, his findings will not be disturbed unless they are against the manifest weight of the evidence. Anderson v. Super, 28 Ill. 2d 319, 192 N.E. 2d 339 (1963). While we thoroughly support the principle just referred to, we believe the circumstances of this case warrant a reversal of the court's ruling. The clear weight of evidence in this case indicates that William McGuirk expressed his intention to assign a portion of his inheritance to Thomas McGuirk's children long before the written assignment was signed. The record also indicates that William McGuirk was advised that the estate was worth about $60,000.00 and that his share would be about $10,000.00. When the assignment was presented to him for his signature, its contents were fully explained to him and he voluntarily signed the document. He never expressed any doubt or other uncertainty concerning the provisions of the assignment before signing it. We believe, therefore, that a fair reading of the record indicates that William McGuirk, by executing the assignment, was acting pursuant to his earlier agreement and with full knowledge of the nature and effect of the transaction. A donor is not prohibited from making a gift to one standing in a fiduciary relation to him, where the gift is voluntary and not the result of undue influence or a betrayal of a trust. I.L.P. Gifts § 14. The weight of evidence in this case establishes that William McGuirk's assignment was purely voluntary and in no way due to undue influence or the betrayal of a trust. Accordingly, the judgment of the trial court which invalidated William McGuirk's portion of the assignment is reversed.

We consider next the ruling which denied William McGuirk's petition to have Kathryn Nissen removed as administrator. Ill. Rev. Stats. (1967), ch. 3, § 276 (The Probate Act)

sets forth those provisions governing the removal of an administrator:

> On the verified Petition of any interested person or upon the court's own motion, the court may remove an executor, administrator . . . for any of the following causes:
>
> (a) When the executor, administrator . . .:
>
> (1) Is acting under letters secured by false pretenses; or
>
> * * *
>
> (9) Becomes incapable of or unsuitable for the discharge of his duties; or
>
> (10) There is other good cause.

In connection with these rather broad provisions, we feel it relevant to refer to the standard of conduct for a fiduciary as set out in Nonnast v. Northern Trust Co., 374 Ill. 248, 29 N.E. 2d 251 (1940), where the Supreme Court at page 261 quotes from an opinion of Mr. Justice Cardozo:

> A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

Comparing, then, the evidence in this case against the standards we have set out above, we are of the opinion that William McGuirk failed to demonstrate that the administrator breached any of her duties with respect to the estate. The judgment of the trial court on this point is, therefore, affirmed.

With respect to the appeal from the order approving the First Current Account, we note that the trial judge made no finding that there was no just reason for delaying enforcement or appeal. Ill. Rev. Stats. (1967), ch. 110A, § 304 (Supreme Court Rule 304) provides:

> If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal. . . . In the absence of such a finding, any

> judgment . . . is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties.

This provision is applicable in this case and clearly indicates that the ruling on the First Current Account was not a final appealable order which must be considered by this court. Accordingly, William McGuirk's appeal from the ruling on the First Current Account is dismissed.

Before concluding, we also express our view that no jurisdictional defects were present in the court below. All necessary parties to the matters under consideration were properly served with notice and the hearing was conducted in full accordance with due process requirements. The assertion that Thomas McGuirk was an indispensable party to the proceedings is without merit. He was in no way affected by the decree. Cf. Riggs v. Barrett, 308 Ill. App. 549, 32 N.E. 2d 382 (1941).

For the reasons given, that part of the order (in appeal 54184) setting aside the assignment is reversed, and that part of the order refusing to remove the administrator is affirmed. The appeal in 54451 is dismissed. This cause is, therefore, remanded to the Circuit Court for entry of an order reinstating the validity of the assignment by William and Thomas McGuirk and for further proceedings not inconsistent with this opinion.

ORDER IN APPEAL 54184 REVERSED IN PART AND AFFIRMED IN PART. APPEAL IS DISMISSED IN 54451. CAUSE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

BURKE, P.J. and GOLDBERG, J., concur.

55359

PEOPLE OF THE STATE OF ILLINOIS, Appellant, vs. BRIAN COOK, Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Mel R. Jiganti, Presiding.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

The People appeal from an order quashing a search warrant and suppressing evidence seized thereunder. 43 Ill 2d R 604(a)(1). The defendant has not appeared in this court and no brief has been filed in his behalf. Despite this, we will decide the appeal upon the merits. Lynch v. Wolverine Ins Co, 126 Ill App 2d 192.

The order appealed from was entered July 14, 1970. The trial court properly relied upon the opinion of this court in People v. Perlman, Gen 53886. But, a rehearing was allowed in Perlman; and, on July 16, 1970, a modified opinion was filed. 126 Ill App 2d 481. This decision is binding authority for reversal of the judgment appealed from.

The affidavit for search warrant in the case at bar is based upon the hearsay statements of an undisclosed informant regarding presence of marijuana upon the described premises. This raises the issue as to whether the affidavit presents a substantial basis for reliability of the informant. United States v. Ventresca, 380 U S 102; People v. Parker, 42 Ill 2d 42, 245 N E 2d 487 and Aguilar v. Texas, 378 U S 108 as cited in People v. Perlman, 126 Ill App 2d 481 at page 483.

The affidavit sets out that the informant was reliable because he had previously furnished information to the officer which constituted the basis for three narcotic raids. This

resulted in one conviction, one complaint stricken with leave to reinstate and a third pending at the date of the affidavit. In our opinion, this is a sufficient showing of reliability as determined in Perlman. In addition, a similar case, People v. Mitchell, 45 Ill 2d 148, 258 N E 2d 345, cited in Perlman, requires reversal of the order appealed from. Therefore, the order of the trial court quashing the search warrant and suppressing evidence is reversed and the cause is remanded for further proceedings.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P. J. and LYONS, J. concur.

54417

GEORGE DARDEN, Plaintiff-Appellant,	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY. Honorable Walter P. Dahl Presiding.
v.	)	
RIVERDALE TERMINAL CORPORATION, ELMER W. SIMS and RAYMOND J. HRADEK, Defendants-Appellees.	)	

MR. JUSTICE DIERINGER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County dismissing plaintiff George Darden's complaint for want of equity. The plaintiff filed his amended complaint in chancery on March 6, 1969, alleging certain facts pertaining to a lease with an option to purchase. The defendants filed a motion for judgment on the pleadings or, in the alternative, a motion to strike and dismiss the amended complaint, alleging in substance that no cause of action is stated, there is no genuine issue as to any material fact, the alleged agreement extending the option to January 1, 1965, was without consideration and unenforceable, any oral agreement for sale of lands is unenforceable under section 2 of the Statute of Frauds (Ill. Rev. Stat., Ch. 59), and the option was not exercised strictly in accordance with its terms.

The court entered an order dismissing this cause for want of equity on March 20, 1969. Then plaintiff filed a motion to vacate that order and attached affidavits from plaintiff and his attorney asserting that there were genuine issues of triable facts. No counteraffidavits were filed. This motion was also denied.

The issue on appeal is whether the amended complaint raises material and genuine issues of fact.

The amended complaint alleges that on January 1, 1962, plaintiff, George Darden, leased a building at 9413 South State

Street, Chicago, Illinois, from the defendant Riverdale Terminal Corporation. The terms provided that the lease extend from January 1, 1962, up to and including December 31, 1963, at a rate of $500 per month.

An option to purchase clause provided for a purchase price of $68,000, with the rent for the first two years applied to the purchase price. The balance of $56,000 was to be paid as follows: $6,000 to be paid simultaneously with the exercise of the option, and the rest to be paid at the rate of $500 per month plus interest on the unpaid balance. The option was to be exercised in writing 60 days prior to the end of the two year term. The lease also contained the following clauses:

1.6 "Before, and as a condition precedent to, acceptance and execution of this lease by Lessee, Lessee has examined the demised premises and appurtences thereto and is satisfied with the physical condition thereof. No representation as to the condition or repair of the demised premises has been made by Lessor, or by any agent of Lessor, that is not set forth herein or endorsed hereon. No promise to decorate, alter, repair, or improve the demised premises has been made, either before or at the execution of this lease, unless and except as set forth herein."

2.5 "All additions, improvements or alterations made by Lessee, during the term of this lease, in and upon the demised premises shall be made at Lessee's sole cost and expense and Lessee shall provide Lessor with written copies of paid invoices covering the cost of all work, labor and material placed in or upon the demised premises and Lessee shall not permit any mechanics' lien to be placed of record against the demised premises. Lessee will not, however, make any alterations that affect the structure of the building on the demised premises without the prior written consent of Lessor."

Also:

"That no extension, change, modification or amendment to or of this instrument of any kind whatsoever shall be made or claimed by Lessee, and that no notice or any extension, change, modification or amendment, made or claimed by the Lessee, shall have any force or effect whatsoever except the same shall be endorsed in writing on this agreement and be signed by the Parties hereto."

The plaintiff took possession of the premises and expended $40,000 to convert the building into a car wash. In addition, he was forced to expend $6,560 to repair the roof, install a new heating system, correct the sewer system, and install a new sump pump.

Plaintiff alleges that he rented the premises on the understanding that the heating plant was working and the roof was in good shape. He also alleges that Mr. Hradek, of the defendant company, told him, "Don't worry, you'll get credit for any extra expenditures."

Plaintiff further alleges he went to see Mr. Hradek in late June or early July of 1963 to discuss a possible extension of the option to purchase because of the extra monies he had been obliged to spend on the roof, sewer, heating plant and pump. Mr. Hradek promised that plaintiff would get credit for the extra expenditures and that he was sure an extension could be arranged in order that plaintiff not be forced to raise the $6,000 immediately.

In a telephone conversation a few weeks later, Hradek told him the extension was O.K. but there had been an increase in taxes and he would have to pay $600 per month rent, and that he would have until January 1, 1965, to exercise the option to purchase the property on the same terms as set forth in the lease. When asked whether the new agreement should be in writing, Hradek said, "we are businessmen, our word is our bond, don't worry about it, just go ahead and take care of your business and everything will work out all right."

In November of 1963, while discussing other business with his attorney, plaintiff was advised that it would be best to have a memorandum in writing verifying the new agreement. The attorney drew up a memorandum, and plaintiff signed and sent it to the defendant company. Shortly thereafter, plaintiff was called on the telephone by Hradek to come down for a discussion with Mr. Sims, an officer of the defendant corporation, who was very angry about the memorandum he had received. At the office plaintiff was told by Sims, "When you came to get the property, you didn't bring a lawyer and why do you want one now . . . . I am a businessman and when I give you my word that you have an extension on your option to purchase the property, that is all you need, because

everyone knows my word is my bond." Sims then told him to return to his business and bring in the money when he got it.

Plaintiff's attorney called the attorney for the defendants after this meeting and was assured that if his client had agreed to an extension, it would be carried out. In January, 1964, plaintiff began paying $600 per month rent.

Early in 1964, Hradek brought a new lease for plaintiff to sign. When asked if it contained the option extension, he said it did not, and plaintiff refused to sign. Plaintiff's attorney called defendants' attorney again and asked him why there was no option to purchase provision in the lease tendered to plaintiff and was told, "Mr. Sims don't like the idea of Darden going to a lawyer, so now he does not want to sell the building to Darden but only lease the place to him."

In June of 1964, Hradek stopped in to have his car washed. Plaintiff told him that he was sure he would have the money ready to pick up the option. He said "fine, 'I'll tell Mr. Sims and I will call you.'" He never called. In November of 1964, plaintiff went to Mr. Sims, presented him with a $6,000 cashier's check and told him he wanted to complete the deal on the building. Mr. Sims said, "I want $56,000 in cash or nothing . . . . I want $56,000 in cash or get out."

Plaintiff contends a new parol agreement was entered into by the parties, the parties have waived the performance of the covenant requiring the option be exercised by a certain day, a new tenancy from year to year had been created, the option to purchase is a part of that tenancy, and justice and good conscience compel the application of the doctrine of equitable estoppel.

The plaintiff further argues that a new agreement was entered into orally in July of 1963. He contends this new agreement extended the lease and option until January 1, 1965. The parol agreement purportedly waives strict compliance with the terms of the original lease. The Statute of Frauds (Ill. Rev. Stat. 1969,

Ch. 59, § 2) states "that no action shall be brought to charge any person upon any contract for the sale of lands, . . . unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith . . . ." The plaintiff also relies on cases which hold that while a parol contract cannot add to or modify the terms of a written contract, there is a distinction between that and a parol agreement to waive strict performance. McQueeny v. Daily, 14 Ill. App.2d 477 (1957); Becker v. Becker, 250 Ill. 117 (1911).

Nevertheless, these cases are not in point here because of the clause in the written contract between the parties which provides that the contract can only be changed by a writing. In Radio Corporation of America v. Smith, 109 Ill. App.2d 91 (1969), the court held where a contract provided that no alteration, modification or extension of the agreement would be valid unless in writing, duly signed by the parties or their authorized representatives, and because there was no proof of additional writings, there was no waiver of contract provisions.

In Southern v. Southern, 438 P.2d 925 (1968), the subject premises were leased in accordance with a written lease for the term March 31, 1965, to March 1, 1966, with an option to purchase "any time up to and prior to November 1, 1965," and requiring that "to exercise said option the lessees must give to the lessor in writing, a notice that the lessees exercise such option . . . ." The tenants alleged by counterclaim that by oral agreement the lease and option were extended for one additional year upon the same terms and conditions contained in the original lease. The trial court entered summary judgment dismissing the counterclaim with prejudice. The Supreme Court of Idaho affirmed, stating at pages 926-927:

> "Accepting defendants' version of the facts, the summary judgment dismissing the counterclaim was properly granted. By reason of the nature of such contracts, time stated for the exercise of an option is of the essence, and no express provision stating that time 'is of the essence' need be contained therein to make it so. [Cases cited.]

> "By reason of the statute of frauds, a written option for the purchase of real property cannot be enforced under a claimed oral extension thereof after the time therein limited has expired."

The plaintiff maintains the doctrine of equitable estoppel is applicable in this case. He contends that he relied on defendant's promises in July of 1963 to extend the option and was thus induced to change his position by continuing to spend his money on improvements and not paying the $6,000 needed to exercise the option by November 1, 1963. He further maintains this agreement was confirmed by a letter sent by him to the defendant, which stated in part: "Confirming our recent conversation and understanding of our mutual agreement to extend my option to purchase the above property for one year . . . ." He also alleges a course of conduct after November 1, 1963, which contributed to his belief that he had until January 1, 1965, to exercise the option. However, the letter was dated November 20, 1963, which suggests any parol agreement took place after the time for exercise of the option stated in the contract, and in order for the purported oral agreement to be valid on the basis of estoppel, the parol modification must have been made before the original date of performance had expired.

We also notice a discrepancy between the amended complaint and plaintiff's affidavit. The complaint states that the conversation with regard to extending the option occurred on November 18, 1963 (after the time to exercise the option had already expired), while the affidavit states this conversation occurred sometime in July, 1963. In addition, the original complaint did not mention any oral agreement to extend the option period, but only alleged assurances and reassurances made after January 1, 1964, that the property would be sold to the plaintiff. The first time the alleged oral agreement was mentioned was in the amended complaint filed March 6, 1969, over four years after the complaint was filed.

The plaintiff was not diligent in pursuing his rights in failing to submit a written notice of his intention to exercise

the option by November 1, 1963. He was well aware that his lease called for any modification to be in writing, and he could have protected his rights by doing so. "One relying on estoppel must have exercised such reasonable diligence as the circumstances of the case require." Beasley v. American Surety Co., 243 Ill. App. 447 (1927).

In Davito v. Blakely, 96 Ill. App.2d 196 (1968), the court stated:

> "Reference is made in plaintiff's argument to the fact that a Court of Chancery sometimes refuses to apply the Statute of Frauds where the result would be to perpetrate a fraud. Especially cited is Loeb v. Gendel, 23 Ill.2d 502, 179 N.E.2d 7. But this doctrine applies where the defendant has contrived to defraud the plaintiff in some act other than a contract of sale. Following the quotation in appellant's brief, the Loeb case expressly adds the following qualification:
>
> > 'The moral wrong alone of refusing to be bound by an agreement because it fails to comply with the statute does not suffice to estop a defendant from asserting the statute as a defense.'
>
> "If this were not the applied rule the effect would be to nullify the statute and open the door to frauds it is intended to prevent."

Finally, plaintiff suggests that a new lease was created by the continuation of the tenancy beyond December 31, 1963, on the same terms and conditions as existed, except for the increased rental of $100 per month to compensate for the increased taxes. He argues that an option to purchase is an integral part of the lease and not an independent covenant and that, therefore, the option to purchase was renewed by operation of law. He relies on Hindu Incense Mfg. Co. v. MacKenzie, 403 Ill. 390 (1949). In that case the lease contained an option to purchase and an option to renew upon the same terms and conditions. The option to renew was properly exercised, and the court held that all the provisions, including the purchase option, were renewed.

However, there is no option to renew in the instant case, which brings it within the holding of Wanous v. Balaco, 412 Ill. 545 (1952), wherein the court said at pages 547-549:

> "Plaintiff relies heavily upon Hindu Incense Mfg. Co. v. MacKenzie, 403 Ill. 390, 86 NE2d 214, claiming it to be decisive of the present case. * * * We cannot agree that

the Hindu Incense case is decisive here. In the case at bar there was no agreement or covenant for renewal. The continued possession coupled with the payment of rent did not renew the old lease, but created a new tenancy from year to year upon the same terms as the old lease, only so far as they are applicable to the new condition of things. Weber v. Powers, 213 Ill. 370.

" * * *

"We believe, however, that even though a purchase option is held to be an integral part of a lease and, therefore, renewed when the lease is renewed, it is not such a provision as will be incorporated in a year to year tenancy created by operation of law. Not every provision in a written lease is made a part of a holdover tenancy--only those terms applicable to the new condition of things are so treated."

For the reasons stated, the judgment is affirmed.

AFFIRMED.

ADESKO, P.J., and BURMAN, J., concur.

Abstract only.

No. 54468

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
vs.	)	
JOSEPH McADRIAN (Impleaded), Defendant-Appellee.	)	HONORABLE SIDNEY A. JONES, PRESIDING.

MR. JUSTICE McGLOON DELIVERED THE OPINION OF THE COURT.

Pursuant to Supreme Court Rule 604(a), the State appeals a discharge of defendant, Joseph McAdrian, under the terms of Ill. Rev. Stat. (1967) Ch. 38, §103-5(b), the relevant section of which provides:

> Every person on bail or recognizance shall be tried by the court having jurisdiction within 120 days from the date defendant demands trial unless delay is occasioned by the defendant, by an examination for competency ordered pursuant to Section 104-2 of this Act, by a competency hearing, by an adjudication of incompetency for trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal.

Joseph McAdrian was arrested for theft. On March 5, 1968, he made a demand for trial while on bond. The cause was continued on motion of the People until May 7. On that date, defendant was discharged for "no probable cause." On May 23, defendant was indicted for the same charge of theft and re-arrested June 24. On August 19 defendant filed a motion for discharge pursuant to §103-5(b). After an extensive hearing on the facts, the hearing court found that, based upon the March 5 demand, defendant was entitled to discharge. Throughout the proceedings below, the State's position was that defendant could not have been properly discharged, because no demand was made on March 5. The following quote of the State's Attorney is illustrative:

> MR. McGEE: Well, the Court raises an interesting point which to my knowledge has not been decided. That is the problem in the Fourth Term policy, that charges should not be held over a person's head once a demand is made, the term should then run.

> However, there is a case in Illinois which held that a demand for trial on a case which is SOL'd, the term will run but in any event in this case no demand was made and we will stand on the record which I have presented to the Court, that no demand was made. So we never reached a point of when the term began to run. It never did run.
>
> If it ran, it would have -- the demand would have had to have been made on March 5th in order for the term to have run at any point in this case. [Emphasis added.]

The State took this position when an examination of the court half sheet for March 5 failed to show a demand recorded. Therefore, the following witnesses were called and testified before the Court sitting with defendant's motion to dismiss before it:

Diane McAdrian, defendant's wife, testified that she was in the courtroom on March 5, and that defendant's lawyer demanded trial.

Mary McAdrian, defendant's mother, testified that on March 5 defendant's lawyer demanded trial and wanted it to show on the record.

Donald Kustok, a co-defendant with McAdrian, testified that McAdrian's attorney demanded trial on March 5.

Albert Zemel, Donald Kustok's attorney, testified that when the case was called, defendant's attorney demanded trial and asked that his demand be noted on the record. The judge indicated that it would be so noted.

Defendant McAdrian testified that his lawyer demanded trial, asked that it be written down, and that the judge replied, "It would be written in the record at that time."

Joseph Carbonaro, defendant's attorney, testified that although Zemel asked for a continuance on behalf of Kustok, he demanded trial for his client McAdrian. The State's Attorney indicated that he wished to proceed against both cases at the same time, and a motion for continuance on behalf of Kustok was granted, and a motion for a continuance of McAdrian's case was granted on behalf of the State.

The magistrate before whom defendants McAdrian and Kustok appeared on March 5 was called as the State's witness. He testified that he didn't recall either of the defendants demand trial on the day in question. However, on cross-examination he admitted that he "may have" told Mr. Zemel in a recent phone conversation that the words "demand for trial" were not necessary if the court sheet showed motion of State. He further testified that he changed "M.D." (Motion, Defendant) to "M.S." (Motion, State) beside McAdrian's name on the half sheet. When the trial court asked the magistrate, "There is no dispute that it was motion of State, is that right?", he replied, "No question. The sheet would prevail."

Gordon E. Beck, a sheriff's patrolman, testified as the State's witness that on the day in question no demand for trial was made. He also testified that Mr. Carbonaro was not present at the hearing on March 5.

Paul Schatte, a claims agent for the truck line that was the complainant against McAdrian and Kustok, testified on behalf of the State that he was present on March 5. He testified on direct examination that he didn't think Mr. Carbonaro was present nor did he remember hearing a demand for trial.

Lawrence Gyllstrom, a sheriff's detective, testified on behalf of the State that on March 5, McAdrian stepped up to the bench and asked that the case be continued, and that no demand for trial was made.

Having heard all of the above testimony, the court determined on August 19, 1969, that a proper demand was made on March 5, 1968, and that, because the requisite 120 days had elapsed, defendant should be discharged.

In this appeal, the State does not question the fact that the demand was made, but argues instead that the May 7 discharge for lack of probable cause tolled the statute, and thus defendant was improperly discharged.

It is an accepted principle of law in this State that "Issues, points, or contentions, other than those going to the court's jurisdiction of the subject matter, will not be considered on appeal unless presented in the trial court and properly preserved for review." I.L.P. Appeal and Error, §181.

Throughout the hearing below, the State's sole position was that no demand was ever made. They cannot now adopt an entirely new theory on appeal. I.L.P. Appeal and Error, §182.

We, therefore, must affirm the judgment of the court below.

JUDGMENT AFFIRMED

McNAMARA, P.J., and DEMPSEY, J., concur.

54660

ZELDA B. WOLFE,
Plaintiff-Appellee,
vs.
CHICAGO TRANSIT AUTHORITY,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

HONORABLE WILLIAM M. BARTH, PRESIDING.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This is an action for damages for personal injuries alleged to have been sustained by Zelda B. Wolfe while a passenger of defendant. The cause, submitted to the trial court sitting without a jury, resulted in a finding for plaintiff in the amount of $3,500.00, upon which finding judgment was entered. The only point raised on appeal is the contention that the trial court erred in considering matters outside the record in determining to deny defendant's post-trial motion.

A detailed account of the evidence presented at trial is not necessary for purposes of the appeal. It is sufficient to note that plaintiff's claim was grounded upon an incident in which she was alleged to have been caught in the automatic doors of a rail coach operated by defendant and which she was boarding as a passenger. The defense was one of alleged impossibility based upon certain technical evidence with respect to safety devices incorporated into the doors of the coach which prevent its closing upon a foreign object with sufficient force to cause physical injury. Evidence that the safety devices in question also prevented the movement of the coach should the doors fail to close due to an obstruction was also introduced to contradict plaintiff's testimony that the train pulled out of the station while she was caught in the door.

Following entry of judgment, defendant filed a post-trial motion in which it was alleged that the court's finding was

against the law and the evidence, that the award of damages was excessive, and that the court erred in failing to find the issues for the defendant.

In ruling on the post-trial motion, the court made reference to defense counsel's closing argument in which he had stressed the technical evidence presented in defense. The court went on to note that he had boarded one of defendant's trains on the very morning of his ruling on the motion for new trial and conducted an experiment with the doors by placing a trial transcript between them. The result of his experiment was contrary to defendant's expert testimony and the denial of the post-trial motion followed.

We must agree with defendant's contention that the trial court's reliance upon an independent investigation dehors the record was reversible error. The courts of this jurisdiction have consistently, in both civil and criminal litigation, condemned such practice by the trial bench based upon the sound proposition that the deliberations of the trial judge must be limited to the record made before him in open court. See People v. Wallenberg, 24 Ill. 2d 350, 181 N.E. 2d 143 (1962); People v. Thunberg, 412 Ill. 565, 107 N.E. 2d 843 (1952); People v. Rivers, 410 Ill. 410, 102 N.E. 2d 303 (1951); Nowaczyk v. Welch, 106 Ill. App. 2d 453 at 462, 245 N.E. 2d 894 at 899 (1969); and Takecare v. Loeser, 113 Ill. App. 2d 149 at 152, 251 N.E. 2d 724 at 726 (1969).

The sound principles announced in the above cited cases are equally applicable here. The function of the post-trial motion was to effect the court's reconsideration of the propriety of the finding based on the evidence. Resort to matters outside the record, no matter what the purpose or how high the motive, in pursuing that reconsideration is error.

The cause must be remanded to the trial court for further proceedings. The nature of those proceedings presents

a delicate problem. The trial judge has been exposed to matters not of record and has relied thereon. It would therefore seem that to ask that he reconsider the motion for a new trial without regard to his investigation would be a task beyond the scope of human capability. Yet, as the trier of fact he is the only one in a position to review the record taking into consideration the demeanor of the witnesses and countless other factors which appear upon trial of a case which lead toward evaluation of the evidence. We therefore conclude that justice may prevail only upon remandment of the case for a new trial.

REVERSED AND REMANDED.

GOLDBERG, J. and SCHWARTZ, J., concur.

53920)
53921) Consolidated

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

EMANUEL J. JOHNSON,
WILLIE STEWARD,

Defendants-Appellants.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Hon. Harry S. Stark, Presiding.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

Defendants, Willie Steward and Emanuel J. Johnson, seek reversal of their conviction of armed robbery. After verdicts of guilty by a jury, both were sentenced to the penitentiary for terms of from five to ten years. Although the appeals are consolidated, we will give separate consideration to the varying contentions raised in behalf of defendants.

Defendant Johnson contends that his identification was the product of improper suggestion and that he was wrongfully denied his right to counsel at a pre-indictment lineup. He also claims error in a jury instruction on alibi. Defendant Steward asserts that the final argument of the prosecutor was prejudicial and that he was denied a fair trial by the introduction into evidence of a photograph which showed that he had previously been arrested for another offense. Both defendants join in a final contention that argument of the prosecutor concerning his personal opinion of guilt denied them a fair trial.

Steward did not take the stand in his own behalf. Johnson testified in support of his pre-trial motion to suppress his identification. Also, at trial, he offered testimony of two alibi witnesses. However, he did not testify before the jury. We will first state the pertinent background facts.

On July 31, 1967, at approximately 2:15 p.m., two bandits committed an armed robbery in a combination grocery and liquor store at 302 East 53rd Street in Chicago. A short man, armed with a pistol, forced the store manager, Hillow Floyd, to the side of the store. The second man, described as tall and slim, took the contents of the cash register. Money was also taken from the pocket of an elderly employee named Morris, who did not testify. The stock boy, Willie Cannon, was also present. The robbers then ordered the three employees to lay upon the floor and they left. This robbery took from three to four minutes. The perpetrators were not masked and made no attempt to conceal their features.

The police were called and responded with promptness. They interviewed the store employees and also other people in the area. They then instituted a search for a white Cadillac automobile with two men. Shortly thereafter, two of the officers were driving west on 60th Street approximately two miles from the scene of the crime. They observed a white Cadillac with two men driving in the other direction. They turned their car and followed. After both vehicles proceeded through an alley, the white automobile slowed down almost to a stop. The passenger alighted and stumbled. The driver started to get out and then jumped back. A number of shots were fired, at least one coming from the driver of the Cadillac and several from the police.

One of the officers apprehended the passenger. The other engaged in a speedy chase but could not overtake the white car. The officers identified the passenger as the defendant Johnson, and the driver as the defendant Steward.

Upon search of Johnson, he had upon his person a pawn ticket for a piece of jewelry and $84.25 in currency. There were thirty-seven $1 bills, one each of bills in the denomination of $5, $10 and $20; one silver dollar; twenty-one quarters; forty-three dimes and thirty-four nickels. This strange assortment would appear to be reminiscent of the contents of a cash register in a retail store. The defendant Steward was identified in court by the stock boy, Willie Cannon. The manager, Hillow Floyd, did not identify him. No point is raised by Steward concerning his identification. Since the identification of defendant Johnson by both Floyd and Cannon is contested, this evidence will be summarized later.

In support of the defense of alibi advanced by Johnson, his friend of some five or six years testified that he played cards with Johnson on July 31, 1967, the day of the robbery, at 319 East 47th Street. This would be about six blocks from the scene of the crime. However, this witness left the game, and Johnson, at approximately 12:30 that day; some two hours before the robbery. Another witness testified that he met defendant Johnson in a tavern on 63rd Street on the day in question. Johnson entered the tavern with defendant Steward about 1:30 p.m. and they remained together drinking until Johnson left at about 2:30 or 2:35.

We will now consider separately the various contentions of both defendants starting with the points raised by defendant Johnson upon his identification. Testimony was first heard by the court alone on the motion of Johnson to suppress the identification. Also, both Floyd and Cannon testified before the court as well as a police officer who was present at the lineup. The court denied the motion to suppress the identification.

About one and a half hours after the robbery, a police officer entered the liquor store and told Hillow Floyd, the manager, that he had a man for him to look at. At that time, Johnson was seated in an unmarked police car parked at the curb in front of the store. The witness went to the doorway of the store and observed defendant Johnson sitting in the car approximately six feet away. Johnson testified in his own behalf that the police ordered him to get out of the car and stand on the sidewalk, which he did. However, this is contradicted by testimony of the witness Floyd. He testified that Johnson did not leave the automobile but that he identified him immediately as the tall man who had participated in the robbery. The witness Cannon testified that he was not called out of the store at that time.

A police lineup was held on the evening of the robbery. The witnesses, Cannon and Floyd, were both present. Five men were brought out to be viewed. The usual lineup procedure was observed. The police asked the two witnesses if they recognized anyone in the lineup. If so, they were told to approach and tap the shoulder of the person identified. Both Cannon and Floyd walked up together and identified Johnson as the tall man who had participated in the robbery. Floyd testified that he touched Johnson first and Cannon was next. There was no conversation between the witnesses immediately prior to their identification of Johnson. There is testimony by Cannon to the effect that Johnson was the tallest of the five men in the lineup. Johnson testified that he is very slightly over six feet tall and weighs in the area of 170 pounds.

The first point raised by defendant Johnson is that his in-court identification was a product of improper suggestion.

He attacks his identification by Floyd when seated in the automobile as well as the lineup procedure. The identification in the automobile occurred approximately one and one-half hours after the robbery. This situation is often referred to as an on-the-spot identification. Its use has been praised rather than condemned. In People v. Moore, 104 Ill App 2d 343, 354, this court characterized this type of procedure as follows:

> "There appears to be no readily available reasonable alternative to the on-the-spot identification. It furnishes a desirably quick and sure way of establishing either probable cause for arrest or its opposite. When properly employed, it affords a real opportunity to an innocent person to avoid the needless detention which would follow if a formal lineup were conducted."

Another decision in point here is People v. McMath, 45 Ill 2d 33. In that case, the Supreme Court approved a speedy confrontation on the theory that, "prompt identification was necessary to determine whether defendant was the offender or whether the officers should continue their search." 45 Ill 2d 33 at 36. A further expression by the Supreme Court in this regard stresses the fact that it was the duty of the police officers, "to determine at once whether or not the victim of the crime could identify the men in custody as the men who had committed the crime. . . ." People v. Young, 46 Ill 2d 82, 87. See also People v. Newell, _____ Ill 2d _____, No. 43342. These authorities compel approval of the police procedure in obtaining on-the-spot identification of defendant Johnson while seated in the automobile.

Quite to the contrary, the authorities relied upon by defendant Johnson are not applicable here. People v. Blumenshine, 42 Ill 2d 508, involved a "show-up" of one suspect alone

and then with another some eighteen days after the crime. People v. Adams, 115 Ill App 2d 360, involved identification by photograph and by a lineup some eighteen days after the crime.

As regards the police lineup at which both Floyd and Cannon identified defendant Johnson, the authorities cited by Johnson are likewise inappropriate here. In People v. Caruso, 65 Cal Rptr 336, 436 P 2d 336, the eyewitnesses had opportunity to observe the robbers for, "no more than thirty seconds." 436 P 2d 336 at 338. Furthermore, the lineup was characterized by the court as "grossly unfair" and "unfairly constituted." The court pointed out that the uncontradicted testimony showed that the lineup was so conducted that it could only have suggested to the eyewitnesses, "that defendant was the man to be charged with the offense." 436 P 2d 336 at 339, 340. In the case at bar, there is no significant criticism made against the lineup.

Similarly, in People v. Lee, 44 Ill 2d 161, there were two pre-trial confrontations. Both of them were so wanting in fairness as to deprive defendant of due process. For example, in the second confrontation, at a coroner's inquest, there were suggestive statements made to the witnesses by the police. Also, the defendant was brought into the hearing room handcuffed to his accomplice who had previously been identified by the same witnesses. As stated, these elements simply do not exist in the case at bar. In addition, in Lee, since these two confrontations were so prejudicial, it was necessary that the in-court identifications of defendant be shown to have been "based on observation independent of and uninfluenced by the improper identification confrontation."

44 Ill 2d 161 at 169. Such situation does not exist in the case at bar where the fair and impartial identification procedures serve only to corroborate the previous untainted and approved on-the-spot identification. In addition, the identification testimony in Lee was, "conflicting and inconclusive." 44 Ill 2d 161 at 169. On the contrary, the identification of Johnson in the case at bar is by two unimpeached witnesses who are definite and certain in their testimony and who corroborate each other as a result of fair and impartial identification procedures.

In this regard, we expressly reject two arguments advanced by defendant Johnson. First, there was a rule to exclude all witnesses at the start of the hearing on the motion to suppress the identification of Johnson. However, the witness Hillow Floyd entered the courtroom and was present in the rear row for some four or five minutes during Johnson's testimony. Thereafter, Floyd testified on the motion to suppress and he made an in-court identification of Johnson before the jury. It was discretionary with the trial court to permit Floyd to testify or to take other action. We find no abuse of discretion here. People v. Gibson, 42 Ill 2d 519, 524; People v. Horne, 110 Ill App 2d 167, 174 and People v. Kozlowski, 95 Ill App 2d 464, 469-70. Also, his presence in the courtroom is simply an insignificant part of the totality of all the circumstances in considering the validity of the in-court identification. Next, we ascribe no importance to the fact that when Floyd testified, he knew of the shooting affray between the police and the occupants of the white automobile. His testimony was given about one year after the hold up. The record fails to show the source of his knowledge.

The next point raised by defendant Johnson is the alleged denial of counsel at the police lineup. This lineup took place on July 31, 1967. The effective date of the procedural safeguards, set out in United States v. Wade, 388 U S 218 and Gilbert v. California, 388 U S 263, is June 12, 1967. However, the courts of Illinois have repeatedly held that these decisions apply only to lineups and other confrontations which take place after indictment. People v. Cesarz, 44 Ill 2d 180, 184 and People v. Palmer, 41 Ill 2d 571, 572-73. See also People v. Davis, 126 Ill App 2d 255, 262-63. We have carefully reviewed the decision in Coleman v. Alabama, 399 U S 1, cited by defendant Johnson in support of his contention that this rule should now be changed. We conclude that Coleman does not consider or pass upon changing of the rule so as to require counsel in a pre-indictment lineup or confrontation.

We find specifically from all the evidence that the witnesses had ample opportunity for an independent observation and identification of the defendant Johnson. People v. Catlett, 48 Ill 2d 56, 62 and People v. Triplett, 46 Ill 2d 109, 114. We also find from all the evidence that the on-the-spot identification of this defendant at the place of the robbery and the later identification in the police lineup were fair in all respects without influence or suggestion so that this procedure should be completely approved. People v. Dennis, 47 Ill 2d 120, 128; People v. Perry, 47 Ill 2d 402, 406 and People v. Finch, 47 Ill 2d 425, 429-30. It was the burden of defendant Johnson to prove that the lineup and the other identification procedure was so unnecessarily suggestive and, based upon the totality of all the surrounding circumstances, so conducive to irreparable mistaken

identification, that he was denied due process of law. People v. Lee, 44 Ill 2d 161, 168; People v. Blumenshine, 42 Ill 2d 508, 511 and People v. Nelson, 40 Ill 2d 146, 150. A careful examination of all of the testimony on the motion to suppress leads us to conclude that the trial court acted properly in denying the motion. A careful review of all of the evidence leads us to conclude that the verdict of the jury is more than amply supported as regards identification of defendant Johnson. We will add here that the verdict of guilt is more than amply supported by the evidence against both defendants.

The final contention made by defendant Johnson relates to the instruction on alibi. The court gave State's Instruction No. 3 over the objection of defendant Johnson:

> The court instructs the jury that where an alibi is interposed as a defense the facts and circumstances in support of such an alibi must be sufficient so that when considered in connection with all the other evidence in the case it creates in the mind of the jury a reasonable doubt of the truth of the charge against the defendant.

Johnson's counsel amplifies his objection by the argument that this instruction had the effect of telling the jury that the burden rested on Johnson to create a reasonable doubt of his guilt. The contention is made that IPI-Criminal contains no such instruction and recommends that no instruction be given on the defense of alibi. This case was tried during July, 1968. IPI-Criminal did not become effective until January 1, 1969. 43 Ill 2d R 451. See also People v. Hazen, 104 Ill App 2d 398, 402. In this regard, defendant cites and relies upon People v. Hazen, 104 Ill App 2d 398. But, the instruction found erroneous in Hazen differs radically from that given in the case at bar. The Hazen instruction told

the jury that, "it is incumbent on the defendant to support" the alibi by such facts and circumstances as would be sufficient, in connection with all [illegible], to create a reasonable doubt [illegible] 111 Ill App 2d 311 at 317. To the contrary, the instruction in the case at bar simply told the jury that the facts and circumstances of the alibi in connection with all other evidence must create a reasonable doubt of guilt. Furthermore, as pointed out by the People in their brief, the court also gave defendant's Instruction No. 14 which defined alibi, cautioned the jury that all evidence on this issue should be carefully considered and then advised them specifically that "the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all other elements of the offense."

The doctrine is not only logical and reasonable but well established that we may not consider any single instruction in isolated fashion but all of the instructions to the jury are to be considered together as one unit. People v. Juve, 106 Ill App 2d 421, 427 and cases there cited. Proceeding in accordance with this admonition, we come to the conclusion that the instructions were proper in all respects and did not prejudice either of the defendants.

In this regard, we note also the application here of the accepted principle that where evidence of guilt is clear and convincing so that the jury could not reasonably have returned a verdict of not guilty, erroneous instructions are generally not cause for disturbing the verdict. People v. Stewart, 46 Ill 2d 125, 129-30; People v. Truelock, 35 Ill 2d 189, 192 and People v. Cazaux, 119 Ill App 2d 11, 18. A specific and

pertinent use of this principle is found in People v. Pearson, 19 Ill 2d 609 where the identification witnesses, "had excellent opportunities to observe" the defendant. 19 Ill 2d 609 at 615-16. The court stated that, "Upon a careful consideration of the entire record it does not appear that the ultimate outcome of the trial could have been affected by the giving of the challenged instruction." 19 Ill 2d 609, 616. That same factor is present in the case at bar. In addition, Johnson's alibi, resting on the testimony of only one witness, is contradicted and virtually destroyed by the unimpeached evidence of two police officers who saw both defendants in the "wanted" automobile very shortly after commission of the crime.

We turn now to the two contentions advanced in behalf of defendant Steward. Claim is made that the constitutional rights of this defendant were infringed upon because the State's attorney told the jury that, "the State's evidence against Mr. Steward has been uncontradicted. And I say that literally and legally." Defendant Steward did not testify and offered no defense in his own behalf. This argument must be rejected for several irrefutable reasons. The record shows no objection by defendant's counsel to the statement of the State's attorney. Therefore, even if his argument could be deemed improper, the point is waived. People v. Hudson, 46 Ill 2d 177, 197; People v. Wilson, 46 Ill 2d 376, 382; People v. Hampton, 44 Ill 2d 41, 46; People v. Norman, 28 Ill 2d 77, 81 and People v. Keane, 127 Ill App 2d 383, 393.

Furthermore, it is settled and established law in this jurisdiction that the prosecutor may argue to the jury that the People's case was not contradicted even in circumstances where the only person who could have done so is the defendant. An

argument of this type merely tells the jury what the record already shows and cannot be construed as an improper reference to failure of the defendant to testify. People v. Palmer, 47 Ill 2d 289, 299; People v. Mentola, 47 Ill 2d 579, 582; People v. Archibald, 129 Ill App 2d 400, 403 and People v. Stanbeary, 126 Ill App 2d 244, 254. See also People v. Jones, 47 Ill 2d 66, 69. In view of the nature and strength of the evidence in support of the jury's verdict, we conclude that the single remark of the prosecutor above cited did not in any manner prejudice the defendant Steward. See People v. Trice, 127 Ill App 2d 310, 319; People v. Phillips, 126 Ill App 2d 179, 184. Also note People v. Acker, 127 Ill App 2d 283 where the prosecutor repeatedly made a similar argument despite admonition by the court. This court referred to Griffin v. California, 380 U S 609, here relied upon by defendant Steward, but affirmed a conviction on the ground that the comments were not "substantially prejudicial to defendant in view of the overwhelming proof of guilt. . . ." 127 Ill App 2d 283 at 294.

Defendant Steward next contends that he was denied a fair trial because the court received in evidence his photograph with a legible legend: "Chgo. P. D. 61978 3/12/64." The argument is made that this clearly indicates that Steward had been arrested and charged with an offense some three years prior to trial. This contention has no merit. Our courts have approved the process of identification by photographs. This is based upon practical reasons of police administration. People v. Covington, 47 Ill 2d 198, 204; People v. Wooley, 127 Ill App 2d 249, 253. Since identification of defendant Steward was one of the issues in the case, it was necessary and proper for the People to show the entire process involved. If the State had not offered the photograph in evidence, counsel for defendant

would then certainly have attacked the identification on this basis. Since this exhibit was therefore necessary, it was proper for the court to receive it in evidence.

In addition, the legend upon the picture does not show that Steward ever committed any other crime in the past. In People v. Maffioli, 406 Ill 315, the Supreme Court expressly approved as proper evidence a photograph of the defendant bearing an even stronger legend, "Police Dept., Rockford, Ill. 6874 John Maffioli 8/26/49." The Supreme Court based this on the theory that the photographs were "properly admitted as the photographs from which defendant was first identified by eyewitnesses to the crime charged." 406 Ill 315 at 322. Another decisive authority on this point is People v. Purnell, 105 Ill App 2d 419. This court specifically sanctioned the action of the trial court in receiving in evidence a photograph of the defendant with a similar legend. The court held that this exhibit was proper "for the relevant purpose of identification." 105 Ill App 2d 419 at 423. The court also differentiated People v. Williams, 72 Ill App 2d 96, cited and relied upon here by defendant, because the picture there involved bore the legend: "Jackson State Prison" which tended to show a prior conviction; an element not present in the case at bar. 105 Ill App 2d 419 at 422-23.

The final contention is raised in behalf of both defendants. It is urged that they were denied a fair trial because the prosecutor allegedly stated his personal opinion of guilt to the jury. Actually the record does not support this contention. The prosecutor, in a sarcastic vein, told the jury that it was a convenient defense tactic for the State to be cast as a villain bringing innocent men to trial and oppressing

them without basis, consideration or evaluation. This argument is far different from that involved in the cases cited and depended upon by defendant. In People v. Hoffman, 399 Ill 57, 65, the State's attorney expressed his own opinion and went so far as to tell the jury that if he had the slightest doubt about the defendant's guilt he would dismiss the case. In People v. Fuerback, 66 Ill App 2d 452, 456, the prosecutor told the jury bluntly that if he did not think defendant was guilty, he would have dismissed the case.

Even assuming the argument subject to criticism, we are constrained to approve it as a proper response invited by arguments previously made by defense counsel. The defense argued on a number of occasions that witnesses for the People were hiding facts; that one eyewitness was not produced because he could not identify the defendants and that the police had lied and altered their stories. With a background of this kind, the conclusion must follow that this argument by the State's attorney was merely a proper and necessary response. People v. Malone, 126 Ill App 2d 265, 270; People v. Phillips, 126 Ill App 2d 179, 185 and People v. Edwards, 98 Ill App 2d 128, 134. In addition, the observations above made concerning the strength of the evidence of guilt and the lack of any showing of substantial prejudice to defendant also impel us to conclude that this contention is valueless.

A careful and deliberate review of all of the authorities cited and of all of the evidence in this record, leads us to the conclusion that both of these defendants received a fair and impartial trial before a fair jury and an able and conscientious judge. Their guilt has been legally and properly established beyond reasonable doubt.

We, therefore, affirm the judgments of conviction in both appeals.

JUDGMENTS AFFIRMED AS
TO BOTH DEFENDANTS.

BURKE, P. J. and LYONS, J. concur.

54791

VANA, INC., Plaintiff-Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT,
IVAN TORRES, Defendant-Appellant.	)	COOK COUNTY.
	)	HON. LESTER JANKOWSKI, Presiding.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This was an action in contract to recover monies due plaintiff for the sale and delivery of goods, wares and merchandise to defendant. Judgment by default was entered for plaintiff upon defendant's failure to file an answer to the complaint. Defendant thereafter filed an answer and a counter claim, as well as a petition requesting the trial court to vacate its order of default, and to hold a hearing on the issues allegedly raised by the answer and the counter claim. The trial court denied defendant's petition to vacate the judgment and defendant appeals.

The pleadings, exhibits and other related papers in the record reveal that plaintiff, during the years 1965 and 1967, delivered to defendant soft drink mixtures and related paraphernalia for the purposes of bottling and distribution to customers. On January 21, 1969 this action was filed to recover the sum of $4,042, plus interest and costs, for failure of defendant to remit payment for periodic deliveries by plaintiff. Through inadvertance a default judgment was entered against defendant in May 1969, although defendant had filed an appearance within the statutory period. The default judgment was vacated on May 27, 1969, defendant was allowed 20 days within which to file an answer, and the cause was set for hearing on September 4, 1969.

Defendant failed to file an answer within the 20-day period and on July 23, 1969 plaintiff filed a motion, with notice to defendant, for a default judgment. Hearing on the motion was continued to August 6, 1969 and defendant was given, pursuant to agreement between the parties, an additional 10 days within which to file his answer. On August 6th the hearing on plaintiff's motion for judgment was continued to the following day, on which latter day the default judgment was entered for plaintiff and against defendant in the amount of $4,194.50 plus costs.

On August 14, 1969 defendant filed an answer to the complaint denying, generally, all the allegations contained in the complaint and affirmatively alleging that the parties had an understanding with regard to the payments due by defendant, that plaintiff "breached that understanding, and that defendant was thereby prevented from making the required payments. Also filed with the answer was a counter claim sounding in tort for the alleged conversion by plaintiff in June 1967 of defendant's merchandise and soft drink paraphernalia, and the alleged "take over" of his business, good will, drivers and routes the counter claim demanded judgment in the amount of $13,200.

On September 4, 1969 defendant orally moved the trial court to vacate the default judgment and hearing on the motion was continued to September 11th. On September 11th defendant filed a written motion to vacate the default judgment and to set a day for hearing on the issues allegedly raised by the answer and counter claim filed theretofore. After several continuances and on October 20, 1969 the motion to vacate the default judgment was denied. On November 19, 1969 defendant's attorney filed a sworn petition requesting that the order denying the motion to vacate be vacated, that the default judgment be set aside, and that the matter be set for a hearing on its merits. Defendant's attorney alleged in the petition that due to

the rush of business he had failed to file an answer within the 20 days allowed upon the vacation of the original default judgment, and that upon receiving the agreed upon additional ten (10) days within which to file the answer he failed to mark his diary and therefore failed to appear in court on either August 6th or 7th at which time the default judgment was entered. The petition was denied.

Defendant contends that the trial court abused its discretion in denying his motion and his petition to vacate the default judgment and to hold a hearing on the issues allegedly raised by the answer and the counter claim. We disagree.

Whether a default judgment will be vacated upon motion of the defendant rests within the sound discretion of the trial court; the overriding factor to be considered is whether justice will be served in the specific action taken upon the motion. Mieszkowski v. Norville, 61 Ill. App. 2d 289; Ellman v. DeRuiter, 412 Ill. 285.

In the instant case the defendant was allowed 20 days from the time the original default judgment was vacated to file his answer or to otherwise plead to the complaint. However, no answer was filed and plaintiff moved, with notice to the defendant, for a default judgment 17 days after the 20-day period had expired. The parties then agreed that defendant be allowed an additional 10 days within which to file an answer, and the hearing on the plaintiff's motion for judgment was continued to August 6th. On August 6th defendant neither had an answer on file nor did he appear in open court. The hearing was continued over to the next day, defendant again failed to appear, and judgment was entered accordingly.

The record clearly shows that the defendant disregarded notices and court appearance dates before the filing of his answer on August 14, 1969. (It should be noted here that the answer filed by

defendant fails to conform to Section 40 of the Civil Practice Act, relating to the necessity of specificity of pleadings. Ill. Rev. Stat. 1969, Chap. 110, Para. 40(1)&(2).) Under the circumstances of this case we are of the opinion that the trial court did not abuse its discretion in denying defendant's motion and petition to vacate the default judgment. See Driscoll & Co. v. Isett, 47 Ill. App. 2d 59.

For these reasons the order denying the motion to vacate the judgment is affirmed.

ORDER AFFIRMED.

LYONS and GOLDBERG, JJ., concur.

52324

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

LUTHER SANDERS,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.

Glenn T. Johnson, J.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

Luther Sanders was found guilty of theft and was sentenced to six months at the Illinois State Farm. His conviction was based on incompetent evidence and must be reversed.

The general manager of Checker Cleaners, Chicago, testified that he was informed by telephone that a Checker store at 13120 South Ellis Avenue had been broken into and a considerable amount of clothing taken.

A Chicago police officer testified he received information that the clothing could be found in a certain house. The occupant of the house told him that Sanders and Elrey Bush had stolen the clothing. The officer arrested Sanders and Bush. Bush told the officer that Sanders was the thief. When they were brought together, Bush repeated his accusation but Sanders denied it. Some of the stolen articles, which Bush told the officer he received from Sanders, were recovered from Bush's home. None was recovered from Sanders'.

The manager and the officer were the only witnesses for the State. Sanders neither testified nor presented evidence. His attorney moved for acquittal. In rejecting the motion the court remarked, "I haven't heard it denied....I heard no denial."

The defendant did not have to prove his innocence. It was the State's burden to prove his guilt; this it did not do. The entire State's case consisted of incompetent evidence: the manager's testimony was wholly hearsay; the police officer's mostly so, and Bush's out-of-court accusation, having been denied by Sanders, was inadmissible.

Sanders was tried without a jury and the State reminds us that a court is presumed to disregard incompetent evidence. If the incompetent evidence was not considered—what was left?

The judgment is reversed.

Reversed.

McNamara, PJ., and McGloon, J., concur.

55431

GENERAL TAYLOR and CLEOPHUS TAYLOR, Plaintiffs-Appellants, vs. HARRISON SHAW, JR., Defendant-Appellee.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY, ILLINOIS. Hon. Mark E. Jones, Presiding.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

Plaintiffs, General Taylor and Cleophus Taylor, brought an action to recover an earnest money deposit of $1,000.00 from defendants, Harrison Shaw, Jr., Joseph H. Allen and Charlene Allen. At a bench trial, the court entered a finding for defendants.

No appearance has been filed in this court by defendant-appellee. Despite the additional burden which this lack of assistance places upon the court, we will consider the merits of this appeal and refrain from reversing pro forma. City of Chicago Heights v. Desautels, ____ Ill App 2d ____, Gen No 54761. See also, Lynch v. Wolverine Insurance Co, 126 Ill App 2d 192; Daley v. Jack's Tivoli Lounge, 118 Ill App 2d 264.

On January 17, 1969, plaintiffs entered into a written contract to buy real estate in Chicago from defendants Joseph H. and Charlene Allen. Pursuant to this agreement, on January 17, 1969, the plaintiffs remitted $1,000.00 to defendant Harrison Shaw, Jr. as an earnest money deposit. Shaw is a registered real estate broker and in this transaction he acted as the agent and broker for the other defendants.

Under the contract, sellers were to furnish within twenty days a report of title issued by the Chicago Title and Trust Company. The contract also provided that "time is of the essence." Defendants failed to deliver the title papers to plaintiffs.

On July 16, 1969, the attorney for plaintiffs mailed to the broker Shaw and to the sellers a letter indicating that plaintiffs considered the January 17, 1969 contract null and void for unreasonable delay in tendering proper title papers. The letter stated that plaintiffs were exercising their option to rescind and requested that the $1,000.00 earnest money deposit be returned to them immediately. The broker did not return plaintiffs' deposit; but instead, on July 31, 1969, acting upon directions of the sellers, he paid the earnest money over to the holder of the mortgage on the property.

On appeal, plaintiffs contend that the judgment of the trial court was erroneous and that they are entitled to recover their earnest money from the defendant Shaw. They do not seek reversal of the judgment in favor of the sellers. They argue that once the contract became null and void because of failure of the sellers to comply with its terms, they could demand immediate return of their earnest money and the failure of the broker to return their deposit entitles them to a judgment in that amount against him.

The evidence is undisputed that the sellers breached the contract when they failed to furnish a report of title within twenty days. This material and basic breach of the contract established the right of plaintiffs to rescind and to obtain return of their earnest money.

In Franks v. North Shore Farms, Inc, 115 Ill App 2d 57, 253 N E 2d 45, this court had occasion to consider a similar situation. In that case, a real estate contract required the sellers to acquire a title insurance policy within sixty days and also obtain a zoning amendment for the subject property. Neither of these conditions was complied with and the plaintiffs,

after rescinding the contract, brought an action to recover their earnest money. The jury returned a verdict for plaintiffs but the trial court entered judgment for the defendant notwithstanding the verdict. This court found substantial evidence to support the jury's verdict and reversed the judgment for defendant. 115 Ill App 2d 57 at 71. In the course of its opinion, this court discussed the responsibilities of the broker with regard to the earnest money he held. The court said:

> "In this case, McKee [the broker] was a stakeholder, depositary, or escrowee having custody of funds belonging to the plaintiffs. Title of the plaintiff to these funds would be divested upon defendant, North Shore, performing under the terms of the contract. McKee held the money for the mutual benefit of both parties. Upon the failure of defendant, North Shore, to perform, plaintiffs had the right to the return of the money. Should the escrowee, McKee, fail to return the same, he became a necessary party to any action by the plaintiffs to recover the deposit. Had there been no conflicting claims to the money deposited, then McKee would have been the only necessary party-defendant."
> 115 Ill App 2d 57 at 63.

Similarly, in the case at bar, the failure of the broker to return the deposit makes him liable to plaintiffs in that amount. Franks v. North Shore Farms, Inc, 115 Ill App 2d 57, 63.

We have no authority to allow interest to plaintiffs since we do not find, "an unreasonable and vexatious delay of payment." Ill Rev Stats 1969 C 74 §2. Allowable costs of this suit will be taxed by the Clerk of the Circuit Court in due course concurrently with the entry of judgment.

The judgment of the trial court is reversed and the cause is remanded with directions to enter a judgment for plaintiffs in the amount of $1,000.00.

JUDGMENT REVERSED AND REMANDED WITH DIRECTIONS.

BURKE, P. J. and LYONS, J. concur.

54220

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
	)	CIRCUIT COURT,
	)	
	)	COOK COUNTY.
vs.	)	
	)	HON. L. SHELDON BROWN,
WILLIE YATES (Impleaded), Defendant-Appellant.	)	Presiding.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was indicted under a two-count indictment charging the offenses of armed robbery and aggravated battery. Defendant entered a plea to the indictment "that he is Guilty in manner and form as charged therein" (sic), and he was found guilty, the trial court's order reciting, "of the said crime of ROBBERY and AGGRAVATED BATTERY in manner and form as charged in the indictment" (sic). Defendant was placed on probation for a period of five years, the first eight months to be served in the Cook County Jail.

Within the term of defendant's probation, a rule was issued to show cause why the probation should not be terminated, on the ground that defendant had been indicted for two criminal offenses allegedly committed during the term of and subsequent to the granting of the probation. Evidence was offered at the hearing on the rule to show cause proving the commission of the subsequent offenses by a preponderance of the evidence, and defendant's probation was terminated. The judgment order of the trial court recites in part that defendant "be and he is sentenced to the Illinois State Penitentiary for the crime of Robbery and Aggravated Battery in manner and form as charged in the indictment" (sic) for a term of not less than fifteen years nor more than thirty years. He appeals.

At the hearing in aggravation and mitigation conducted at the hearing on the rule to show cause, the assistant state's attorney

argued that the subsequent offenses for which defendant had been indicted occurred within three weeks of his release from custody after having been placed on probation in this matter. Counsel then went on to state that the subsequent offenses were crimes of violence and of invasion of a home, and he concluded his remarks in this regard by stating, "A person like this does not belong out on the streets. Certainly, he is in gross violation of the confidence of this Court." The People thereupon recommended that defendant be sentenced to a term of fifteen years to thirty years in the penitentiary.

After hearing evidence in mitigation, the trial court initially remarked that he recalled that the defendant had a misdemeanor record, but when advised by the assistant state's attorney that defendant had no prior convictions, the court stated that defendant had:

> "No prior convictions. I thoroughly took that into [consideration] in putting my trust in him and granted him five years probation. That, of course, has been violated. And there is no question in the Court's mind about the offense in [the subsequent offense of armed robbery] or of the aggravation shown in [the subsequent offenses of armed robbery and aggravated battery.]"

The trial court concluded, stating, "As to the State's recommendation, I don't see anything wrong with it. I think it fits the picture perfectly..." and defendant was sentenced to the term recommended by the People.

Upon the revocation of probation theretofore granted upon a conviction of an offense, the trial court may not consider offenses committed by the defendant subsequent to the granting of the probation in invoking punishment; a grant of probation defers the imposition of a sentence as to the matter wherein the probation was granted. See People v. Morgan, 55 Ill. App. 2d 157; People v. Smith, 105 Ill.

App. 2d 14; People v. Livingston, 117 Ill. App. 2d 189. It is apparent that the trial court, in passing sentence in the instant matter, took into consideration the subsequent offenses for which the defendant had been indicted during the term of probation. This was error, and the sentence imposed by the trial court, under the circumstances of this case, was excessive. People v. Johnson, ____Ill. App. 2d ____(1st Dist., No. 54392, March 15, 1971.) The sentence is therefore reduced to a term of not less than three years nor more than ten years in the penitentiary.

Defendant also contends that the trial court was without authority to sentence him to a term of fifteen years to thirty years in the penitentiary, inasmuch as the sentence fails to differentiate between the two offenses of which he was found guilty, since the maximum term which could have been imposed upon the aggravated battery conviction was ten years; and that the trial court heard improper evidence at the hearing held in aggravation and mitigation conducted at the hearing on the rule to show cause, relating to an arrest of the defendant which did not result in a conviction. These contentions are obviated by this Court's determination that the sentence must be reduced.

For the reasons expressed the sentence is reduced to a term of not less than three years nor more than ten years in the penitentiary and as so modified, the judgment is affirmed.

JUDGMENT MODIFIED AND AS MODIFIED, AFFIRMED.

LYONS and GOLDBERG, JJ., concur.

55527

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JOHN RHYMES, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Honorable James D. Crosson, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

John Rhymes entered pleas of guilty to indictments 68-3376, 68-3377 and 68-3381, each of which charged him with a separate offense of burglary. Following receipt of a stipulation of facts with respect to each offense charged, the court entered judgment on the pleas and sentenced defendant to three concurrent terms of not less than three nor more than nine years in the Illinois State Penitentiary. On appeal defendant contends that the pleas were not voluntarily made but were the product of coercion by the trial court and that the court failed to properly admonish him prior to accepting the pleas.

On the date set for trial defendant moved to have counsel other than the public defender, who had been previously appointed to defend him, appointed on his behalf. He gave no reason for the request. The motion was denied and defendant then requested a conference. Although the record does not indicate what transpired at the conference, subsequent remarks of the trial court which do appear of record indicate beyond doubt that a conference was in fact held.

Following the conference the case was again called and defendant answered not ready for trial. The court ordered that the case proceed to trial and further ordered that prospective jurors be available following a recess which was then taken. Following the recess, defendant advised the court that he did not

wish to be present in the courtroom. Thereafter, in a colloquy with the court, defendant orally moved for substitution of judges, which motion was denied, and then stated that he was not ready for trial and would not go to trial. No reason was advanced for his alleged unpreparedness for trial. The court then advised defendant that he was going to trial whether he was in the courtroom or in the bullpen. Defendant requested that he be placed in the bullpen.

Defendant was placed in the bullpen and prospective jurors were brought into the courtroom. Before questioning of the first panel of veniremen was completed, the court was advised that defendant wished to enter pleas of guilty. At that time the following occurred:

THE COURT: He desires to plead guilty?

MR. DARRAGH: Your Honor, that is my understanding right now.

THE COURT: Is that right, Mr. Rhymes?

MR. RHYMES: Yes.

THE COURT: Yes? All right. Now, you have just said to me and so has your lawyer--

MR. DARRAGH: As to all three indictments, Your Honor.

THE COURT: That you desire to plead guilty to all three of the indictments, is that correct?

MR. RHYMES: That's right.

THE COURT: That is indictment number 68-3376, 3377, and 81. Now, when you--before I can accept this plea I must explain to you that when you plead guilty you automatically do away with the right to have your case tried by a jury. You are in the process, right now, of selecting a jury. When you plead you do away with the right to try your case by a jury, do you understand that?

MR. RHYMES: Yes.

THE COURT: On each one of these indictments the Court may sentence you to the Illinois State Penitentiary from one to any

number of years. May do it two ways. May run consecutively, that is together, or they may run separately. Finish one sentence and the next one starts. Do you understand what I mean?

MR. RHYMES: Yes.

MR. VAN ZEYL: On consecutively they run one after the other.

THE COURT: That's what I'm saying. Do you understand that?

MR. RHYMES: Yes.

THE COURT: You insist on pleading guilty?

MR. RHYMES: Yes.

Defendant first argues that he was forced to accept counsel against his wishes, compelled to absent himself from the proceedings which were to determine his guilt or innocence, and otherwise bullied into submission by the trial court all of which resulted in an involuntary plea of guilty. We do not concur in defendant's finding of fault with the actions of the trial court.

The matter of appointment of counsel other than the public defender was governed by Illinois Revised Statutes Chapter 34, section 5604 (1967) which provided in pertinent part:

> Any court may, with the consent of the defendant and for good cause shown, appoint counsel other than the public defender, and shall so appoint if the defendant or accused shall demand and show good cause for that appointment. . . .

As noted above, defendant gave no reason for his request that counsel other than the public defender be appointed. The statute provides that such appointment shall be made only where good cause is shown. We are therefore compelled to hold that the trial court's denial of the motion was not error.

Neither was the court provided with reason why the interests of justice and fairness required a continuance of the cause nor any other reason for a continuance as provided in section 114-4 of the Code of Criminal Procedure [Illinois Revised Statutes Chapter 38, section 114-4 (1967)]. Thus the record is devoid of a

factual basis upon which can be founded defendant's assertion that the trial court's insistence that the cause proceed to trial, witnesses being present, constituted an improper coercive force which compelled him to enter a plea of guilty which might not otherwise have been made.

Defendant's contention that he was forced to absent himself from the proceedings which were to determine his guilt or innocence is also without merit. His short absence from the courtroom cannot fairly be said to have been prompted by any cause other than his own determined effort to force a delay in the proceedings.

Defendant has also argued that the court failed to properly admonish him prior to acceptance of the plea. The colloquy between the court and defendant set out above clearly reveals that defendant was completely and properly admonished as to the consequences of a plea of guilty with respect to waiver of trial by jury and the possible sentences which could be imposed upon findings of guilty. Moreover, the record as a whole indicates that defendant understood the nature of the charges against him. See People v. Bey, No. 54688 Illinois Appellate, opinion filed May 28, 1971.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J., concur.

55080

133 Ill.App.2d 540

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	APPEAL FROM
vs.	CIRCUIT COURT,
ANGEL L. PANTOJA, Defendant-Appellant.	COOK COUNTY.
	HON. DANIEL J. [illegible] Presiding.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a jury trial of the crime of burglary and was sentenced to a term of ten years to twenty-five years in the penitentiary, the sentence to run consecutively to a sentence of three years to eight years imposed on defendant after a conviction of an unrelated burglary nine months earlier. Defendant appeals.

Chicago Police Officer Kenneth Osteen testified that on December 1, 1967 he received a radio dispatch of a burglary in progress at a building located at 1004 North Hoyne Avenue in Chicago. The officer testified that he immediately proceeded to that address and entered the front of the building through an open door. Upon entering, the officer observed the door to the first floor apartment partly open and also observed someone peering out from behind the open door. As the officer approached the door, it closed, and the officer thereupon kicked it open. He testified that he observed the defendant standing in the middle of the living room with a screwdriver in his hand.

The officer testified that he asked the defendant for identification and that when the defendant failed to produce identification, the officer placed him against a wall and searched him. The officer testified that he found a woman's wristwatch in defendant's right hand coat pocket and that defendant was then placed under arrest. The officer thereafter walked through the apartment and observed that the contents of dresser drawers were strewn on the

floor. In the kitchen the officer found another screwdriver on the floor and also observed that the screen to the outer door had been torn and the glass on the inner door broken.

Derold Doughty testified that he resided in the first floor apartment in question and that on December 1, 1967 he was in Salem, Illinois. He testified that when he returned home he found that the glass of the window on the rear door to the apartment had been broken, that there were pry marks on the rear door, and that the contents of every dresser drawer in the apartment had been strewn on the floor of the apartment. The witness also testified that a wristwatch belonging to his wife was missing, and that several adding machines and typewriters belonging to his church had been placed on a table in a "bundled" manner, which the witness stated were not in that position upon his leaving Chicago prior to December 1st. Doughty also testified that prior to leaving Chicago the apartment had been locked, that he did not give anyone permission to enter the apartment during his absence, and that he did not know the defendant.

Sophie Peter testified that on December 1, 1967 she observed a man on the back porch of the building at 1004 North Hoyne Avenue, and that she saw the man cut a hole in the screen of the rear door, open the inner door, and enter the apartment. The witness notified the police.

Martin Ernst, a police officer connected with the Evidence and Recovered Property Division of the Chicago Police Department testified from a police record that a woman's wristwatch inventoried in the case had been inadvertently sold at a police auction prior to the date of the trial. Defendant objected to this testimony on the ground that it constituted hearsay.

Defendant testified in his own behalf and stated that he was

arrested on the street a block from the apartment. Defendant denied burglarizing the apartment.

Defendant first maintains that it was error for the trial court to have permitted Officer Ernst to testify from the police record as to the disposition of the woman's wristwatch, inasmuch as such testimony was hearsay since the officer had no independent knowledge of the sale of the wristwatch at the police auction.

The admission of the evidence as to the disposition of the wristwatch prior to the trial of this cause was cumulative of the other evidence of defendant's guilt adduced by the People. Defendant was found in an apartment which had been entered by force and the dresser drawers of which had been ransacked. He was found with a screwdriver in his hand, and another screwdriver was found in the area of the apartment where entrance was gained. Inside the apartment were items of personal property capable of being the subject of a theft, including adding machines and typewriters which had been placed in a position by someone other than the occupant of the apartment. Finally, the occupant of the apartment gave no one permission to enter the apartment during his absence from the city and also testified that he did not know the defendant. The People adduced sufficient evidence from which the trier of fact could have found that defendant intended to burglarize the apartment and that he was guilty of the offense charged in the indictment, without the need of the evidence of the wristwatch. (See People v. Ray, 116 Ill. App. 2d 269.) No prejudicial error was committed in allowing into evidence the testimony as to the disposition of the wristwatch from the police record.

Defendant also contends that it was error for the assistant state's attorney to have elicited from the defendant that he had been known by other names in the past. He argues that such evidence was used to draw the inference that defendant was a professional criminal.

Defendant had been convicted of a prior burglary under a combination of his aliases. Defendant took the stand in his own behalf at the trial of this cause, and that prior conviction was later read into the record for impeachment purposes, which the People had a right to do. (People v. Gilmore, 118 Ill. App. 2d 100, 106-107.) The evidence was properly elicited. Further, no objection was made to the questioning of the assistant state's attorney in this regard, and the matter is considered waived.

Defendant finally contends that the sentence invoked by the trial court was excessive, both in the term of years imposed and in the fact that the sentence was made to run consecutive to a prior sentence imposed for an unrelated crime.

While the Appellate Court has the power to reduce a sentence imposed by the trial court, that power must be exercised with due caution and only in a proper case, where the penalty imposed constitutes a departure from the spirit and basic purpose of the law. Supreme Court Rule 615(b)(4); People v. Taylor, 33 Ill. 2d 417, 424. It must therefore appear from the record that the sentence is excessive and not justified under any reasonable view taken from the record.

Furthermore, sentencing of a defendant upon his conviction of a crime must not be an act of vengeance, and excessive minimum sentences may defeat the effectiveness of the parole system by making mandatory the incarceration of the defendant long after effective rehabilitation has been accomplished. Abernathy, Sr. v. People, 123 Ill. App. 2d 263; People v. Lillie, 79 Ill. App. 2d 174.

In the instant case the record discloses that the defendant was thirty-one years of age at the time of his conviction for this offense, that he had completed an eighth grade education in Puerto Rico, that he came to the states in 1954, that he has a wife and

two children, that he was employed as a mechanic, and that he entered the Kankakee State Hospital in 1966 in an effort to overcome an addiction to cocaine. The record further discloses that defendant was first convicted of a crime in 1961 at the age of 23 on a charge of malicious mischief, and that he was subsequently convicted on three separate charges of burglary.

In the recent case of People v. Glasgow, 126 Ill. App. 2d 82, defendant also had a prior record of four felony convictions and several misdemeanor convictions. The court on review, at page 90 of the opinion, noted the fact of defendant's lengthy criminal record and the need for the protection of the public from his propensities, but nonetheless reduced the sentence imposed by the trial court on the grounds of the nature of the offense committed and the attendant circumstances of the case.

The defendant in the instant case is a young man, married and the father of two children. He had been employed as a mechanic. He was convicted twice in 1961, for malicious mischief and burglary, and once in 1963 for burglary, for which he was sentenced to a term of one year to three years, but his last conviction prior to the conviction in the instant case occurred in the latter part of 1968. Between his third and fourth convictions defendant spent time in the Kankakee State Hospital in an effort to overcome an addiction to narcotics. It further does not appear that defendant was armed with a weapon in this or any of his other burglaries.

The sentence imposed on the instant conviction, of ten years to twenty-five years to run consecutively to the previously imposed sentence of three years to eight years, negates the possibility of defendant's rehabilitation as a practical matter, inasmuch as he could conceivably remain incarcerated for a total of thirty-three

years. The sentence under all the circumstances of the case should be reduced.

For these reasons, the sentence is reduced to a term of not less than five years nor more than fifteen years in the penitentiary, the sentence to run concurrently with the sentence of three years to eight years imposed for the above noted prior conviction and, as so modified, the judgment is affirmed.

JUDGMENT MODIFIED AND AS MODIFIED, AFFIRMED.

LYONS and GOLDBERG, JJ., concur.

133 Ill. App. 2d 574

54862

IRWIN WEINBERG, Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
vs.	)	
IRVING RESNICK, Defendant-Appellee.	)	Hon. Wayne Olson, Presiding.

MR. PRESIDING JUSTICE ADESKO DELIVERED THE OPINION OF THE COURT:

Plaintiff, Irwin Weinberg, a commission salesman, brought an action against defendant, Irving Resnick, president of the Arrow Furniture Corporation, for the alleged breach of a verbal promise by the defendant to pay the plaintiff in the event that Arrow Furniture Corporation did not pay the plaintiff for furniture ordered. At the close of plaintiff's evidence, the trial court directed a verdict for the defendant. Plaintiff appeals, contending (1) defendant's verbal promise does not come within the Statute of Frauds and (2) certain documents prepared in the regular course of business were erroneously excluded from evidence.

At the trial, plaintiff's testimony was as follows: Plaintiff was employed as a commission salesman for Ward Furniture Company and Garrison Furniture Company (hereinafter Ward and Garrison) manufacturers of bedroom and dining room furniture. Plaintiff had sold goods to the Arrow Furniture Corporation (hereinafter Arrow) for 10 or 12 years through June, 1968. Prior to June, 1968, plaintiff was notified by Ward and Garrison that they would not approve Arrow's credit. Plaintiff testified that if credit was approved by Ward and Garrison, in the event of non-payment by Arrow, the plaintiff would not be personally liable.

In June, 1968, plaintiff told defendant, the president of Arrow, that if Arrow did not pay Ward and Garrison for merchandise

shipped, plaintiff personally would be required to do so. Plaintiff then testified that defendant told plaintiff that since he owned apartment hotels and an automobile lot he would personally guarantee and indemnify the account if plaintiff would arrange to authorize the shipment of merchandise to Arrow. Plaintiff, thereafter, authorized the shipment of 27 different orders for furniture over a period of seven months.

Plaintiff further testified that he had paid the account of Arrow in the amount of $1,165.00, to Garrison Furniture Company and $3,365.41 to Ward Furniture Company. Arrow, deep in financial difficulty, had gone out of business.

The court, after plaintiff rested, entered judgment on a directed verdict for the defendant, commenting:

> "The primary obligator has been Arrow Furniture Company, have to look to them for the payment of all debts.
>
> A promise by Mr. Resnick was a collateral promise, if these invoices were billed to Mr. Resnick on his promise it would be a separate contract; all invoices are to Arrow.
>
> Arrow was the primary obligator, the promise, if any was by Mr. Resnick."

We find that the trial court was correct in entering judgment on a directed verdict for the defendant. A multitude of cases have found that a cause of action founded on an alleged oral promise to pay the debt of another is unenforceable by the Statute of Frauds. The Statute of Frauds provides:

> "That no action shall be brought...whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person...unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." (1969 Ill. Rev. Stat., Ch. 59, § 1.)

No such writing as required by the Statute of Frauds was offered into evidence by the plaintiff. Instead, plaintiff establishe by his own evidence that the alleged oral promise of the defendant was to answer for the debt of another. Plaintiff's evidence established that plaintiff's employers, Ward and Garrison, looked for payment from Arrow and not the defendant. As to this set of facts, the courts have held that the promise is unenforceable by the Statute of Frauds.

In McDowell, Stocker & Co. v. Sharp, 157 Ill. App. 165 (1910), plaintiff asked defendant Sharp if Sharp would guarantee the account of one Wollgren for the printing presses he was about to purchase. Defendant replied "that he would, that if Wollgren did not pay, he, Sharp, would." As to the verbal promise,the court said on page 167, "We think that the verbal promise of the defendant of August 8, that he would pay for the presses if Wollgren did not, was in substance a promise to pay the debt of another and within the Statute of Frauds."

In Bonner and Marshall Co. v. Hansell, 189 Ill. App. 474 (1914), one Pray, an agent of the defendant, promised to answer for the debt of the Cox Brothers. Pray promised that he "would see that the account was protected and paid." The court held that the oral promise of Pray to answer for the debt of the Cox Brothers was void under the Statute of Frauds since "the promise of Pray, on behalf of appellant, 'to see that the account was paid', or 'to guarantee the account', was a collateral undertaking to answer for the debt or default of the Cox Brothers."

The court, in its discussion of collateral and original undertakings, quoted on page 481, from Stone v. Walker, 70 Mass. 613, where the Massachusetts Chief Justice illustrated the distinction as follows:

> "If the promise is made by one in his own name to pay for goods or money delivered to, or services done for another, that is original; it is his own contract on good consideration, and is called original, and is binding on him without writing. But if the language is 'Let him have money or goods, or do service for him, and I will see you paid', or 'I promise you that he will pay', or 'if he does not pay I will' this is collateral, and though made on good consideration, it is void by the Statute of Frauds."

The case before us clearly falls in the latter category. See also Dubon Paper Co. v. Flint, 207 Ill. App. 367 (1917); Tranto v. DeBenedetti, 283 Ill. App. 182 (1935); Foremost Insurance Agency v. Puncoa, 16 Ill. App. 2d 371, 148 N.E. 2d 5 (1958). For this reason, we hold that the alleged oral promise in this case is unenforceable.

We also hold that certain records of the Ward and Garrison Furniture companies were properly excluded from evidence since plaintiff, a salesman, was not familiar with the records and not being a custodian of the records could not testify as to the manner in which the records were prepared. Ill. Rev. Stat.1969, Ch. 110A, Sec. 236. See Sacco v. Chicago Transit Authority, 6 Ill. App. 2d 266, 127 N.E. 2d 266 (1955), and the Committee Comments to Supreme Court Rule 236, S.H.A., Ch. 110A, §236.

For the reasons herein stated, the trial court acted properly in directing a verdict for the defendant.

AFFIRMED.

BURMAN, J., and DIERINGER, J., concur.

(ABSTRACT ONLY)

55649

BUCKINGHAM BUILDERS, INC. and ARTHUR W. PIPENHAGEN,	)	
Plaintiffs-Appellants,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
vs.	)	
ROBERT W. HEINZE,	)	HON. JOSEPH B. HERMES, JUDGE PRESIDING
Defendant-Appellee.	)	

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The plaintiff-appellant in this case filed his brief and excerpts of record and has otherwise complied with all statutory requirements and rules for the perfection and prosecution of this appeal. No appearance or brief was filed by the defendant-appellee.

Where, after due notice, an appellee fails to appear to file a brief or to present argument in support of an order or judgment entered in the Circuit Court, the Appellate Court may reverse the order or judgment without a consideration of the merits. C.I.T. Corporation v. Blackwell, 281 Ill. App. 504, 541 Briar Place Corporation v. Harman, 46 Ill. App. 2d 1, 196 N.E.2d 498, Ogradney v. Daley, 60 Ill. App. 2d 82, 208 N.E.2d 323, Gibraltar Corporation v. Flobudd Antiques, Inc., Gen. No. 54628, 269 N.E.2d 515.

The orders of the Circuit Court dismissing the plaintiff's suit and denying his motion for summary judgment are reversed, and the cause is remanded with direction that judgment be entered in favor of plaintiff, Arthur W. Pipenhagen, and against Robert W. Heinze, in the amount due on the involved notes plus accrued interest and attorney's fees.

REVERSED AND REMANDED WITH DIRECTIONS.

ADESKO, P. J. AND DIERINGER, J.

CONCUR.

(Abstract only)

No. 53689

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

SHIRLEE R. GLASSMAN, Plaintiff-Appellee, -vs- ELI GLASSMAN, Defendant-Appellant.	Appeal from the Circuit Court of Cook County. Honorable Raymond P. Drymalski, Judge Presiding

JONES, J.

This is a divorce proceeding in which there was a split or two-stage trial. The first was limited to the question of plaintiff's entitlement to a divorce. Following the first stage the court granted plaintiff a divorce and ordered another trial as to rights to child custody, child support, alimony, disposition of property and attorney fees. Subsequent to the second stage of the trial the court rendered a judgment favorable to the plaintiff. Defendant appeals from both judgment orders.

The plaintiff's original complaint was filed July 16, 1966 praying for separate maintenance or in the alternative for divorce, upon the grounds of extreme and repeated physical cruelty which occurred approximately six years prior to the filing of the complaint, and went on to state that defendant "...has been physically cruel to the plaintiff on many occasions,..." The defendant never filed a pleading directed to plaintiff's original complaint. By agreement of the parties the cause was placed on the dormant calendar by an order entered on December 6, 1966. On March 20, 1967, plaintiff was granted leave to file an amended complaint.

The amended complaint contained the same allegation of physical cruelty as the original complaint and also alleged that defendant had committed adultery on two occasions during the month of March 1966. By an order entered on April 21, 1967, the cause was removed from the dormant calendar and set for trial on May 22, 1967. Defendant filed an answer to plaintiff's amended complaint on June 21, 1967. With both parties and their attorneys present trial was commenced on June 29, 1967. There is no transcript of the testimony given or the proceedings had on that date but a bystander's report was filed from which it appears that the defendant was called as an adverse witness pursuant to Section 60 of the Civil Practice Act and testified briefly concerning his payment of temporary child support, alimony and utilities. There was also introduced into evidence at that hearing the parties' 1966 federal income tax return, a deed to certain property of the parties, a copy of a report by a certified public accountant on the defendant's business and the 1966 corporate federal income tax return for said business. For reasons not appearing of record the trial was interrupted at that point and continued to September 25, 1967. Thereafter, on June 29, 1967, plaintiff filed a reply to the answer of the defendant. On September 25, 1967 reciprocal discovery depositions of the parties were ordered and on November 1, 1967 the court appointed a certified public accountant to audit the books and records of the parties and to file a certified audit with the court. The same order directed the parties to furnish the accountant any information requested by him within ten days. By leave of court the defendant substituted attorneys on December 14, 1967. Defendant's new attorney then sought and was granted leave to withdraw defendant's amended answer to plaintiff's amended complaint. The motion was thereafter granted in part and denied in part and plaintiff was granted leave to file her second amended complaint which was done on December 29,

1967 under the style of "Second Amended and Supplemental Complaint for Divorce and Other Relief." Plaintiff's second amended complaint charged defendant with extreme and repeated mental cruelty, extreme and repeated physical cruelty, consisting of two specific alleged acts, and the same two acts of adultery alluded to in her amended complaint. Defendant's subsequent motion to strike the second amended complaint and for a bill of particulars was denied. Defendant answered the second amended and supplemental complaint denying the charges of physical and mental cruelty and adultery and pleaded an affirmative defense of adultery by the plaintiff. By an order entered January 9, 1968 the cause was set for trial on January 29, 1968. On January 17, 1968 defendant filed an answer to the second amended and supplemental complaint and a demand for jury trial. The jury demand was dismissed on plaintiff's motion for the reason that the jury demand came too late since the trial of the cause had already commenced. On January 25, 1968 plaintiff filed a reply to defendant's answer to the second amended and supplemental complaint. By order of court entered on January 29, 1968 the trial was reset for February 5, 1968. On February 5, 1968 defendant filed his motion for mistrial alleging that he had been deprived of his constitutional right of speedy trial because the trial was commenced on June 29, 1967 and then interrupted and continued for approximately seven months. The motion for mistrial was denied and the matter proceeded to trial. On February 19, 1968 the court entered the first of the two judgment orders here on appeal granting plaintiff a divorce. In rendering its decision granting plaintiff a divorce the court stated, "However, be that as it may, the court feels that at the close of all the evidence, that the plaintiff has established a prima facie case, and there will be a finding for the plaintiff." The written order granting plaintiff a divorce contained no findings of facts. In short form it

found the issues for the plaintiff, granted her a divorce and set the cause for trial on the matter of custody of the children, permanent alimony, permanent child support, property rights and attorney fees for March 17, 1968. The trial on the latter issues commenced on March 27, 1968 after which a judgment order favorable to plaintiff was rendered. That judgment is also appealed from and will be considered later.

The foregoing review of the pleadings is but a brief resume of all pleadings contained in the record. The pleadings mentioned are interlaced throughout with numerous motions, petitions and demands relating to temporary alimony and child support, provision of an automobile for plaintiff, management of various properties of the parties, violations of temporary injunctions, alleged contempt of court for failure to comply with court orders, a garnishment action, suits and demands involving defendant's mother and managers and co-owners of property of the parties, and other issues, none of which are of controlling consequence in the case. At both stages of the trial each of the parties testified in person and offered other witnesses in their behalf. Cross examination was vigorous. On the whole, the record and transcript disclose a bitterly contested case, one that surely approaches the zenith for determined and protracted dispute of family status and property. The trial court displayed enviable patience through the proceedings although repeatly placed under stress by the attorneys.

Defendant's first contention is that the pleadings have failed to state a cause of action against him and that plaintiff's attempts to amend her original complaint have failed to cure the defects and the trial court committed error in refusing to strike plaintiff's second amended and supplemental complaint upon which the case went to trial. Defendant argues that plaintiff's original complaint for separate maintenance or in the alternative for divorce, filed while the parties were residing together under the same roof and

alleging as grounds therefor a single act of physical cruelty occurring six years prior to the separation of the parties fails to state a cause of action for either separate maintenance or divorce and cannot be cured by the filing of an amended complaint which merely adds an allegation of adultery founded upon matters alleged to have taken place subsequent to the filing of the defective original complaint. Defendant's argument is premised upon his contention that the original complaint totally failed to state a statutory cause for divorce upon the ground of physical cruelty. While plaintiff's original complaint set forth only one specific act of physical cruelty which occurred on a particularly stated date, defendant overlooks additional allegations in the complaint which, after alleging the specific incident, states that defendant "...has been physically cruel to the plaintiff on many occasions,...." True, one act of physical cruelty is not sufficient grounds for divorce in Illinois. Godfrey v. Godfrey, 284 Ill. App. 297, 1 N. E. 2d 777. Although plaintiff's complaint was lacking in specificity regarding a required second act of physical cruelty it nevertheless does allege in general terms that the defendant was guilty of other and further acts of physical cruelty toward plaintiff. While doubtless the complaint would have been subject to attack by motion for its failure to allege more than one specific act of cruelty, since it does allege other and further acts of cruelty in general terms we cannot say the complaint wholly failed to state a cause of action for divorce upon the grounds of extreme and repeated physical cruelty. The complaint stated such information as reasonably informed defendant of the nature of the claim he was called upon to meet. Civil Practice Act, Section 42(2) (Illinois Revised Statutes, Chapter 110, Section 42(2)). Section 33(3) of the Civil Practice Act requires that pleadings shall be liberally construed with a view to doing substantial justice by the parties. No citation of authority

is now necessary to say that the courts of this State have made it clear that older rules calling for strict and technical construction of pleadings have been discarded and those sections of our Civil Practice Act calling for liberal construction have been implemented. The metamorphosis from strict to liberal construction has been rewarding for cases are now more readily tried on their merits without first having to run a gauntlet of discarded technical rules of pleading.

Under the allegations of the complaint, there being no objection thereto, the plaintiff would be permitted to submit evidence to prove not only the one specific instance of cruelty alleged, but any other acts of physical cruelty within the compass of her evidence. The defendant never filed a motion or any other pleading directed to the original complaint seeking its dismissal or seeking to make it more definite and certain by stating other specific acts of cruelty upon which the plaintiff would rely at the trial. In any event, the case remained pending and the complaint never suffered a final dismissal. In that posture and under the liberal rules of pleading followed in Illinois the complaint was subject to amendment pursuant to Section 46(1) of the Civil Practice Act and Section 1 of the statute on Amendments and Jeofails, (Illinois Revised Statutes, Chapter 7, Section 1). Under the authority of these statutes, and cases interpretive thereof, the court did not abuse its discretion in granting plaintiff leave to file an amended complaint.

As part of his argument addressed to the insufficiency of the pleadings defendant contends that it was error for the court to deny defendant's motion to strike and dismiss plaintiff's second amended and supplemental complaint since it was actually a supplemental bill to her amended complaint which was defective on its face and thus could not cure the defects of the amended complaint; also that the supplemental bill is defective on its face since it alleges two acts of

physical cruelty six years prior to the separation and at the same time states that the parties lived together as husband and wife until one month prior to the filing of the complaint; and that it alleges acts of mental curelty committed prior to the enactment of mental cruelty as a grounds for divorce in Illinois. Defendant's argument is without merit. It is unnecessary to consider the validity of the allegations of the second amended and supplemental complaint regarding extreme and repeated physical and mental cruelty since the allegations of adultery were sufficient and were properly included in the second amended and supplemental complaint. It is not true that the amended and second amended complaints allege the adultery to have occurred subsequent to the filing of the original complaint. The original complaint was filed in July 1966. The amended complaint alleged the two acts of adultery to have occurred in March 1966, but the facts of the adultery did not become known to her until after the filing of the original complaint. But it does not matter whether the acts of adultery were alleged to have been committed before or after the filing of the original complaint. In either case it would be proper to permit the amendment of the complaint to set forth the additional charge. Section 39 of the Civil Practice Act states: "Subject to rules, supplemental pleadings, setting up matters which arise after the original pleadings are filed, may be filed within a reasonable time by either party by leave of court...." In the case of Trapani v. Trapani, 109 Ill. App. 2d 202, 248 N. E. 2d 294, an original complaint was filed alleging three specific acts of cruelty on specific dates prior to the filing of the complaint. Subsequently the plaintiff filed an amended complaint alleging that the parties were reconciled and that thereafter further acts of cruelty were committed upon the plaintiff on three additional specific dates. The decree found that three acts of extreme and repeated cruelty were established, only one of which was

included in the supplemental complaint. Defendant there contended that no relief could be granted on the supplemental complaint for a cause of action which did not exist when the original complaint was filed and since the trial court found one act of cruelty existing at the time of the original complaint and two acts charged and established under the supplemental complaint the defendant reasoned that no cause of action exists under the original complaint as Illinois requires two acts of cruelty to establish a cause of action for divorce. Defendant argued that since the evidence established only one act of cruelty under the original complaint, the supplemental complaint did not aid it and the court granted the decree erroneously. The court in rejecting defendant's argument, stated:

> "The answer to this position was rather succinctly stated more than 100 years ago in Davis v. Davis, 19 Ill 334 (1857), when the court stated at pages (sic) 342:
>
> > 'In the English ecclesiastical courts, it is every day's practice to introduce charges of adultery committed since the institution of the suit, by supplemental bill, and a sentence may be obtained on facts not existing at the commencement of the suit...Where, then, the necessity of driving her to a supplemental bill, or a fresh suit, when all the matter can be determined as the pleadings stand?'
>
> Defendant cites 71 CJS Pleading, Section 330(c) and 41 Am Jur Pleading, Section 265, for the proposition that where a complaint states no cause of action, it cannot be aided by a supplemental pleading setting up matters that have occurred after the commencement of the suit. Miller v. Cook, 135 Ill 190, 25 NE 756 is cited for the same proposition. These citations have no bearing on the case at bar for the very simple and cogent reason that the original complaint in this case did state a cause of action."

Also see Kovac v. Kovac, 26 Ill. App. 2d 29, 167 N. E. 2d 281; and Rasgaitis v. Rasgaitis, 347 Ill. App. 477, 107 N. E. 2d 273.

Defendant's objections that the charges of adultery contained in the amended complaint and in the second amended and supplemental complaint were vague, indefinite and insufficient to charge adultery in that they failed to state the time, place and circumstances of the alleged act are likewise without merit. Plaintiff's amended and second amended and supplemental complaints charged "That on two occasions during the

month of March, 1966, at Chicago, Illinois, the defendant committed adultery with one Judith Blaha, the facts of which did not become known to plaintiff until subsequent to the filing of this action." Defendant cites Hahn v. Hahn, 136 Ill. App. 301, and Field v. Field, 319 Ill. 268, 149 N. E. 797. Those cases held that a complaint charging adultery should state the time, place, circumstances or the name of the person with whom such act of adultery was committed, or any excuse for the omission to state such particulars. The charge of adultery made by the plaintiff here is sufficient to comply with the requirements of those cases.

Defendant next complains that the trial court erred in denying his motion for a bill of particulars, in denying his motion for mistrial and in striking his demand for a jury trial.

The defendant was first charged with adultery in plaintiff's amended complaint which was filed on March 20, 1967. The charge was continued in the second amended and supplemental complaint which was filed on December 29, 1967. An order of court entered on December 20, 1967 granted plaintiff leave to file a second amended complaint by December 29, 1967, granted defendant leave to answer or otherwise plead by January 5, 1968, and set the case for trial on January 10, 1968. The defendant's motion for bill of particulars was not filed until January 8, 1968 when the cause was re-set for trial on January 29, 1968. The granting or denial of a bill of particulars has always been held to rest within the discretion of the court. City of Chicago v. Callender, 396 Ill. 371, 71 N. E. 2d 643; Petersen v. City of Gibson, 322 Ill. App. 97, 54 N. E. 2d 79. We cannot say that under the circumstances presented by the record there was an abuse of that discretion here. It is the same with the defendant's motion for mistrial and demand for trial by jury. The motion for mistrial was based upon the fact that the trial originally

commenced on June 29, 1967 and was continued, as defendant states, to February 5, 1968. Defendant asserts that thereby he was deprived of his constitutional right to a speedy trial. No authority is cited to support his proposition. The record shows that the defendant appeared at the trial with his attorney and was called under Section 60 of the Civil Practice Act and testified briefly. While he was on the witness stand several tax returns were identified and admitted into evidence. For reasons not appearing of record the trial was interrupted at that point and continued to September 25, 1967. During the ensuing period, and until the trial resumed, the defendant filed a large number of motions, demands and other pleadings. The case was continued for trial from the September 25th date from time to time and finally resumed on February 5, 1968, approximately seven months later. Under these circumstances the defendant is in no position to complain of excessive delay since he has, at the very least, substantially contributed to the delay by his several motions, petitions and demands.

The demand for jury was made on January 17, 1968, approximately eighteen months after the case was filed, eight months after the trial had commenced and at a time after which the trial had been set to resume. The Illinois Divorce Act grants trial by jury as a matter of right in contested divorce cases (Illinois Revised Statutes, Chapter 40, Section 8), but timely demand therefor must be made (Illinois Revised Statutes, Chapter 110, Section 64). The action of the trial court in striking defendant's demand for jury trial was not error under the circumstances presented here. The demand for jury trial was not timely made.

Defendant next contends that the trial court committed reversible error when it entered an order granting plaintiff a divorce but failed to incorporate in the order the grounds upon which the divorce was granted. The order in question is short and set forth in full as follows:

> "This cause coming on to be heard from the contested divorce call and having been assigned for trial, the plaintiff and the defendant answering ready for trial, the court hearing the evidence adduced by the plaintiff and the defendant, hearing arguments of counsel and the court being advised on the premises:
>
> It Is Hereby Ordered that a judgment for divorce be and the same is hereby entered in favor of the plaintiff, Shirlee R. Glassman, and against the defendant, Eli Glassman."

Defendant cites Morrow v. Morrow, 15 Ill. App. 2d 109, 145 N. E. 2d 381, which reversed a trial court divorce decree which found defendant guilty of "continual and habitual use of intoxicating beverages for a period of at least two years prior to the time of the commencement of this cause." The court stated that the complaint did not state a statutory ground for divorce and the decree was not based upon a statutory ground for divorce because "continual and habitual use of intoxicating beverages" is not tantamount to "habitual drunkenness." Since "continual and habitual use of intoxicating beverages for at least two years" was included in the findings of the decree and was to serve as the sole ground for granting the decree of divorce, the decree was not based on a statutory ground of divorce and was set aside. As thus distinguished the Morrow case is not controlling here. We think the controlling factor in determining the validity of the order is Section 64(4) of the Civil Practice Act which provides, "No special findings of fact or certificate of evidence are necessary in any case in equity to support the decree." This statutory proviso has been applied in separate maintenance cases (Smeck v. Smeck, 298 Ill. App. 625, 19 N. E. 2d 411; Ryan v. Ryan, 321 Ill. App. 467, 53 N. E. 2d 283) and in divorce cases (Hellrung v. Hellrung, 331 Ill. App. 173, 72 N. E. 2d 647), and we think it is properly applied here. Inclusion of findings in the decree make obvious to the parties and courts of review the basis for the trial court's action. The advantages from such practice are readily apparent and make the inclusion of findings in decrees the preferred practice. Nevertheless, the decree, though devoid of

findings to serve as its basis, is in compliance with the above statute and further is well supported by evidence of adultery found in the record.

Which brings us to defendant's next assignment of error: That plaintiff failed to prove any of the grounds for divorce alleged in her complaint and that the court was unaware of plaintiff's burden of proof and committed reversible error in its finding. Much argument is directed to the issues of extreme and repeated physical cruelty and extreme and repeated mental cruelty, whether there was sufficient proof thereof and whether there had been a condonation by the plaintiff-wife. Since in our view there was an abundance of evidence in the record to support a finding of adultery, we need not consider the issues of physical and mental cruelty or their condonation. Defendant's attacks on the evidence of adultery are directed in large part at the credibility of the witnesses. There were, as is usually the case, no eyewitnesses to the three separate acts in evidence. Briefly, a cocotte testified that in the middle of February 1966 she went to defendant's place of business to see her cousin who was employed there. Upon arriving she learned that her cousin had left for the day but she met defendant and became engaged in conversation with him. They then commenced drinking and after a time engaged in an act of intercourse there in the office. She further testified that about two weeks later she returned to defendant's place of business after closing time and on this occasion there was more talking, drinking and playing around, that while she was nude from the waist up the plaintiff's brother walked in. She stated that defendant introduced her to the brother who then left. After that, she and defendant again engaged in an act of intercourse. The third episode of intercourse was stated to have occurred a few days later at the cocotte's apartment when defendant visited her there.

Plaintiff's brother testified on plaintiff's behalf. He verified that he had caught defendant playing around in his office with the semi-nude girl. He also testified that in 1961 he and defendant took a vacation trip to Jamaica together and that he caught defendant in an act of intercourse with a pick-up who was passed out drunk on the bed at the time.

Defendant in his testimony categorically denied all the acts of intercourse.

Defendant assails this evidence of adultery as being unbelievable, unreliable and incomprehensible. He points out that the cocotte in her testimony was unable to fix the dates of her encounters with defendant and cites what he describes the manufactured quality of the testimony of the plaintiff's brother. Both were termed flagrant liars. Essentially the same arguments were addressed to the trial court who rejected them in granting plaintiff a divorce. Our examination of the record discloses some minor inconsistencies in the testimony of the cocotte and personal relationships which could serve as some motivation for falsfying of testimony. The only testimony offered by defendant tending to disprove the evidence of adultery was his own denials. As presented here, it is a question of credibility of the witnesses and that is a matter lying within the special province of the trial judge. We perceive nothing that would require, or even permit, his judgment in that regard to be set aside. The evidence of adultery was ample to support the granting of a divorce and it is not for us to substitute our findings for those of the court below unless such findings are clearly and manifestly against the weight of the evidence. Stevens v. Fanning, 59 Ill. App. 2d 285, 207 N. E. 2d 136; Olson v. Olson, 66 Ill. App. 2d 227, 213 N. E. 2d 95. Such is not the circumstance here.

At the close of the evidence of the first stage of the hearing, which was to determine the plaintiff's right to a divorce, the court, in rendering its decision, stated:

> "...the court feels that at the close of all the evidence, that the plaintiff has established a prima facie case, and there will be a finding for the plaintiff."

Appellant now argues that this statement shows the court was unaware of the burden of proof required of the plaintiff and that this is a further showing that plaintiff has failed to make proper proof of defendant's adultery.

The degree of proof required to substantiate a charge of adultery is, of course, a preponderance of the evidence. Lenning v. Lenning, 176 Ill. 180, 52 N. E. 46; Balswic v. Balswic, 179 Ill. App. 118. Defendant cites Trust v. Chicago Motor Club, 276 Ill. App. 289, which holds that any presumption arising when a prima facie case is made out by evidence is not conclusive but will vanish when evidence is presented which is contrary to the presumption. The case is not in point. It should be noted, too, that the rule for which it is cited is subject to criticism. See Cleary, Handbook of Illinois Evidence, Second Edition, sec. 4.15.

Webster's New World Dictionary, Second Edition, states prima facie means "at first sight; on first view, before further examination." Black's Law Dictionary, Fourth Edition, defines "prima facie case" as being one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side.

A prima facie showing is one which is sufficient to authorize a finding on the matter in issue unless contradicted or explained. The existence of the prima facie case is provisional and does not change the burden of proof but only the burden of introducing further evidence. It means only that a determination of a fact shall be sufficient to justify a finding of a related fact in the absence of any evidence to the contrary. The effect is to create the necessity of

evidence to meet the prima facie case created, and which, if no proof to the contrary is offered, will prevail. As soon as opposing evidence is received the case is to be determined upon all the evidence, including the prima facie evidence, and the question then is whether the weight of the evidence preponderates in favor of the party having the burden of proof. Johnson v. Pendergast, 308 Ill. 255, 139 N. E. 407; Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 N. E. 897. Here, the courts pronouncement that the plaintiff had "established a prima facie case" came after the court had heard all the evidence, defendant's as well as plaintiff's. His pronouncement was therefore not attuned to the posture of the case at the time it was made for all the evidence bearing on plaintiff's right to a divorce was then under consideration. The use of the term "prima facie" must be deemed to have been inadvertent and improper word usage, and not an error of law of sufficient magnitude to justify a reversal of the trial court's findings.

For the reasons stated we believe the order of the trial court granting plaintiff a divorce from the defendant was proper and should be affirmed.

The second stage of the trial was concerned with the adjudication of property rights, permanent alimony, child custody, permanent child support and the allowance of attorney fees. The hearings concerning those matters were extensive and detailed and a copious record was compiled. At the conclusion of the evidence the court entered its supplemental judgment in which it found and ordered that plaintiff's interest in the jointly held assets of stocks and real estate is $124,109.30, that she has a one-half interest in the real estate on West Arthur and North Hamilton Avenues which has a value of approximately $27,000.00 and that she be awarded $50,000.00 as alimony in gross. Paragraph (d) of the judgment order then provided as follows:

"(d) That there be awarded to the plaintiff the total

sum of $201,109.30 as of the 30th day of November, 1967, in the following manner:

> (1) All of the stock presently held by Rinella And Rinella at its value on November 30, 1967.
>
> (2) All of the individual and joint accounts of the parties held by Freehling & Co. at their net value on November 30, 1967.
>
> (3) That in the event the stocks held by Rinella And Rinella and Freehling & Co. do not have a net equity, as of the date of transfer, equal to $201,109.30 then the defendant's interest in the various pieces of real estate shall be sold to the extent necessary to equal the total amount awarded plaintiff."

The supplemental judgment then provided that upon receipt of "the assets" provided in the aforementioned paragraph (d) plaintiff shall quickclaim her interest to the defendant in five pieces of real estate and her interest in the Glassman Glass Company (a family owned corporation and defendant's principal business), and be barred from other alimony. Plaintiff was awarded sole care and custody of the three minor children of the parties and defendant ordered to pay child support of $100.00 per week plus private school tuition and summer camp expenses. Defendant was further ordered to pay plaintiff's attorneys $25,000.00 which the court found to be a fair and reasonable fee. There are other provisions of the supplemental judgment with which we need not be concerned.

Defendant has lodged a vehement, even vituperative, objection to the supplemental judgment as it relates to the settlement of property, alimony in gross, child support and attorney fees. Defendant avers that it will strip him of all his property and assets and leave him penniless, and since plaintiff brought no money or property into the marriage the award of property and alimony work a gross inequity upon him.

It should be noted that the defendant was uncooperative, evasive and devious during attempts of the court and counsel to discover the true extent of defendant's properties. The

court appointed an accountant to make an examination of the assets of the parties and make a report to the court. The accountant's request of defendant for a listing of his properties was flatly refused. In sum, the attitude of the defendant and his attorney seems to have been "find it if you can." During the course of the second stage of the trial, and before commencement of hearings one morning, the court announced it had received the following telegram:

> "We have wired Judge Boyle and Judge Hunter relative to an expression that I discussed over the outrageous proceedings of the Glassman case; we have requested and continue to demand a trial by an impartial court and competent jurisdiction. We feel that Eli Glassman has been repeatedly denied his basic constitutional rights and--"

The telegram was signed by "American Society of Divorced Men Chas. D. Metz." In the questioning that ensued the defendant admitted that he belonged to the organization, that he had discussed his case with them and that they felt they should intervene in someway. When defendant was asked if he authorized the Society to proceed with the telegram defendant answered that he told them to do whatever they thought was necessary. It is apparent from the record that defendant's attorney was in noway connected with the sending of the telegram. Plaintiff's attorney made a motion that defendant be held in contempt of court for its sending. The court termed the action "monumental gall" but nevertheless held the motion for contempt in abeyance. The record does not disclose that any further action was taken with regard to the contempt motion. Consideration of the conduct of defendant regarding his financial activity discloses a course of devious conduct, manipulation, attempts to conceal and a strong suggestion of fraud in the filing of tax returns and concealment of cash receipts paid into the glass business.

The principal items of property and assets of the parties consisted of a portfolio of stocks and bonds, bank accounts, five parcels of improved real estate in the City of Chicago and one-half interest in the Glassman Glass Company. Some

of the stocks and bonds were held by plaintiff in her name, some by defendant in his name and some in the joint names of both. Only one of the five pieces of real estate was wholly owned by the parties and that was the one described as the Arthur Avenue property, the down payment for which had been taken from a joint bank account. The title was originally taken in the names of plaintiff and defendant as joint tenants but sometime later the plaintiff, in furtherance of an alleged estate plan, was induced to convey her interest to the defendant so that at the time of trial title to the property was in defendant's name. As part of its supplemental judgment the court found that the plaintiff did not intend to make a gift of her interest in the property and is still the owner of one-half interest. Whatever interest the parties owned in the remaining tracts of real estate was in joint tenancy.

We are unable to determine from the record how the court arrived at the figure of $124,109.30 as plaintiff's interest in the jointly held assets of stock and real estate. There is nothing in the record to indicate, as the court found, that the defendant admitted that the plaintiff's interest in the jointly held assets of stock and real estate was $124,109.30. Plaintiff's Exhibit 11 was the report of the court appointed accountant concerning the assets of the parties. It co tained a list of the stocks of the parties and a partial list of the manner in which the title to the stocks were held and the net valuation of the stocks on November 30, 1967. The same exhibit contained a list of the parcels of real estate of the parties, the amount of the interest owned by the parties and a statement as to the value of the interest of the parties in these tracts. But a footnote to the exhibit states that the values of the real estate properties are in noway assumed as current. There was no real attempt made to establish the value of the real estate property but

the court's findings were nevertheless based on the valuations fixed by the accountant. Plaintiff's Exhibit 24 contained an additional list of stocks and bonds with some indication of their ownership but not of their value.

The effect of the court's supplemental judgment was to place a dollar valuation upon the real estate and the shares of stock (whether of all shares or only the jointly held shares we are unable to determine) and order the defendant to pay plaintiff in cash for her one-half interest therein, including the Arthur Avenue parcel of real estate. Not only was the determination of value arbitrary and unsupported in the record, we deem the mode of disposition of the property to have been improper. The defendant should not have been ordered to purchase plaintiff's interest at the price and in the manner provided, and plaintiff should not have been ordered to convey her interest in the parcels of real estate and the shares of stock for the stated price.

The only provision in the Divorce Act under which the court could give plaintiff any interest in the property held in defendant's name is Section 17 (Illinois Revised Statute, 1967, Chapter 40, Paragraph 18) which provides: "Whenever a divorce is granted, if it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same, upon such terms as it shall deem equitable." However, to justify a conveyance under this section special circumstances and equities must be alleged and established by the evidence. Stevens v. Stevens, 14 Ill. 2d 99, 150 N. E. 2d 799; Everett v. Everett, 25 Ill. 2d 342, 185 N. E. 2d 201; Skoronski v. Skoronski, 395 Ill. 301, 69 N. E. 2d 690. Plaintiff made no attempt to allege or prove special circumstances or equities with regard to any property held

by defendant in his name other than the parcel of real estate on Arthur Avenue. With regard to that property the court found special circumstances and equities to exist and that plaintiff did not intend to give her interest in the property to defendant and ordered on the basis thereof that plaintiff remained the owner of a one-half interest. The court's finding and determination in that regard is supported by the evidence in the record and should not be set aside.

Defendant in his testimony admitted the joint ownership of all parcels of real estate except that on Arthur Avenue and stated that the joint tenancies were created only for convenience, that he did not intend a gift of the real estate to his wife by having her name placed on the title instruments as a joint tenant. This is insufficient to overcome the burden of the presumption in law of a gift from husband to wife where she is given title to property purchased in whole or in part from his funds. Stevens v. Stevens supra; Lutticke v. Lutticke, 406 Ill. 181, 92 N. E. 2d 754; Nickoloff v. Nickoloff, 384 Ill. 377, 51 N. E. 2d 565. As to property other than the real estate no issue was made by either party claiming special equities or circumstances in order to assert ownership or claims in property of the other. It therefore must be assumed that the parcels of real estate held in the joint names of the parties are owned in equal portions, all stocks held by plaintiff in her name are her property, all stocks and bonds held by defendant in his name are his property, all stocks and bonds owned by the parties in their names jointly are owned in equal portions and ownership of the funds in joint bank accounts is equal.

In awarding alimony the court must consider the means and needs of the parties and such factors as the age and condition of their health, their property and income, their station in life and their conduct. Schwarz v. Schwarz, 27 Ill. 2d 140, 188 N. E. 2d 673; Still v. Still, 96 Ill. App. 2d 320, 238 N. E. 2d 613; Bandy v.

Bandy, 32c Ill. App. 55, 61 N. E. 2d 586. Ordinarily alimony is to be awarded in such a manner that it will remain within the control of the court and this is done by providing for alimony payable periodically. McGaughy v. McGaughy, 410 Ill. 596, 102 N. E. 2d 806. But the court may, where circumstances warrant, make an award of alimony in gross to be paid either in a lump sum or by installment payments. Honey v. Honey, 120 Ill. App. 2d 102, 256 N. E. 2d 121. In Dmitroca v. Dmitroca, 79 Ill. App. 2d 220, 223 N. E. 2d 545, it is said that alimony in gross may be awarded where the entire record shows that periodic payments are not feasible, as where the record shows that a spouse does not pay his bills or will not work, Smothers v. Smothers, 25 Ill. 2d 86, 182 N. E. 2d 758; Miezio v. Miezio, 6 Ill. 2d 469, 129 N. E. 2d 20, or where the husband was regularly intoxicated and refused to work, Persico v. Persico, 409 Ill. 608, 100 N. E. 2d 904. Defendant's conduct in his financial dealings above described do not furnish assurance of the viability of an order for periodic alimony payments and the court's decision to award plaintiff alimony in gross was justified. Nor do we see fit to disagree with the amount of the award. The trial court was in a better position than we to consider the needs of the parties and the ability of the defendant to pay, and to take into account the other factors to be considered in making an award of alimony. We do not feel the allowance of $50,000.00 alimony in gross to be punishment inflicted on the defendant. The determination of the court in making the award of alimony is supported in the record and should not be disturbed.

As to that part of the supplemental judgment which ordered defendant to pay plaintiff's attorneys' fees, defendant contests both his liability and the amount. No hearing was held regarding the allowance of attorney fees

but plaintiff's attorneys filed a memorandum with the court which detailed the number of hours devoted to the case and the items of expenses. The judgment found "the fair and reasonable fee to be paid by defendant" to plaintiff's attorneys to be $25,000.00. It is stated in Jones v. Jones, 48 Ill. App. 2d 232, 198 N. E. 2d 195, that:

> "The courts of Illinois have long held that in order to justify an allowance to a wife in a divorce action of attorney's fees from the husband, it is necessary that the complainant make a proper demand for such fees, show that she is financially unable to pay them herself and that her husband is able to do so. Arado v. Arado, 281 Ill 123, 117 NE 816; Kunstmann v Kunstmann, 333 Ill App 653, 77 NE2d 888; Geiermann v. Geiermann, 12 Ill App2d 494, 139 NE2d 838; Minnee v. Minnee, 14 Ill App2d 215, 144 NE2d 173.
>
> In Arado v. Arado, supra, the court said:
>
> > '...solicitor's fees are not allowed as a matter of right but rest in the sound discretion of the court, dependent on the inability of the complainant to provide for herself and pay the expenses of the litigation and upon the ability of the defendant to do so. The discretion is to be exercised in view of the conditions and circumstances of the case....'"

Also see Berg v. Berg, 85 Ill. App. 2d 98, 229 N. E. 2d 282.

In this case the plaintiff's second amended and supplemental complaint prayed for attorney fees from defendant but contained no allegation of her own inability to pay attorney fees. Furthermore, there was no evidence of and the court's order made no findings regarding plaintiff's inability to pay her own attorneys' fees. To the contrary, the record discloses that the plaintiff owns a substantial amount of cash, stocks and real estate and is well able to afford and pay her attorneys. Accordingly, under the authorities cited, it was error for the court to order defendant to pay the plaintiff's attorneys' fees and that portion of the supplemental judgment must be set aside.

We consider that defendant's objection to the provision of permanent child support at $100.00 per week for three minor children is not well taken for such allowance finds support in the evidence touching the circumstances of the parties, the needs of the children and the ability of the

defendant to pay.

We have considered other assignments of error by defendant but find nothing which would require reversal or further modification of the orders and judgments of the trial court.

For the reasons stated the judgment of the trial court granting plaintiff a divorce is affirmed. The supplemental judgment of the trial court is modified to provide that plaintiff is entitled to the ownership of all shares of stocks and bonds held in her name, one-half the shares of stocks, bonds, bank accounts, real estate interests and any other property held in joint tenancy by the parties, including the Arthur Avenue parcel of real estate; further, that the defendant shall convey one-half interest in the Arthur Avenue property to plaintiff, and each of the parties shall sign or endorse stock certificates, bonds or other indicia of ownership as may be necessary to effect division thereof in accordance with this opinion. In all other respects the supplemental judgment of the court is affirmed.

Judgment granting divorce affirmed; supplemental judgment modified in part and affirmed in part.

CONCUR: /s/ Edward C. Ebersnacher

CONCUR: /s/ George J. Moran

Publish abstract only.

55224

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LORRAINE M. DULIN, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT OF COOK COUNTY. HONORABLE FRANCIS W. GLOWACKI, PRESIDING.

MR. JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

Defendant was charged with driving too fast for conditions and for failure to yield the right-of-way to a pedestrian. Ill. Rev. Stat., 1969, ch. 95-1/2, § 172(c).* Defendant was found not guilty of driving too fast for conditions but was found guilty for failure to yield the right-of-way to a pedestrian. Judgment was entered and defendant was fined $50 and costs. On appeal defendant contends that she was not proved guilty beyond a reasonable doubt.

Testimony of Robert Green, for the State:

At 6:30 P.M. on March 25, 1970, defendant rang his doorbell and said that she just hit a child sitting in the middle of Ridge Road in Wilmette. He ran outside and observed the child's body in front of defendant's car. One of the child's boots was lying behind the car. The lighting in the 300 block of Ridge Road where the accident occurred is "fairly poorly lighted." On March 25th it was snowy and wet.

Testimony of Officer Richard Gillespie, for the State:

When he arrived at the scene of the accident he observed a two-year old child lying in the street in the center of the roadway,

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* Ill. Rev. Stat., 1969, ch. 95-1/2, § 98-239, Uniform Act Regulating Traffic On Highways, in effect at the time of this case, was repealed pursuant to Ill. Rev. Stat., 1969, ch. 95-1/2, § 20-301, of the Illinois Vehicle Code.
Section 172(c) was replaced by ch. 95-1/2, § 11-1003(c), effective July 1, 1970.

just about in the northbound lane of Ridge Road. Ridge Road was extremely wet on March 25th since it was snowing. The street lighting was fair.

He observed no skidmarks at the location where the accident occurred. The point of impact was north of the intersection of Sterling Lane and Ridge Road. There are no traffic signals at this intersection.

When he questioned defendant, defendant told him "she was driving north on Ridge Road and she made - there is a curve in the roadway. She was coming, just starting to come out of the curve. All of a sudden there was a child right in front of her and she heard a thump and she stopped her car right away and got out of the car and went, assuming the child was under the car, she went to the apartment building, rang the bell and told Mr. Green that she hit a child and call the police and when she returned to the car she found the child actually in front of the car." The child was sitting with his back towards defendant's car.

Testimony of Yung Yu, for the State:

He is the father of the deceased child. He lives at 147 Sterling Lane. He did not know how his child happened to be in the middle of Ridge Road on March 25th.

Testimony of Lorraine Dulin, defendant, in her own behalf:

On March 25, 1970, at 6:30 P.M. she was driving home on Ridge Road from a friend's home. She is a teacher. She was not too familiar with Ridge Road. As she came around a curve in the road at Sterling Lane, proceeding north, she observed a small child immediately in front of her car sitting in the street just to the left of the car's front license plate. The child's back was facing towards the car. She applied the brakes and then heard a "thump." After she heard the noise she stopped and got

out of the car and ran for help. The brakes on the car had been checked the week before.

The child was sitting in the middle of the street in the northbound lanes. She was not aware that there were two north lanes on Ridge Road because "it was wet where the cars had gone, and there was snow on the other side." She saw the child only a fraction of a second before she heard the "thump."

On March 25th it was snowy and wet. She had the windshield wipers on as well as the lights. As she came around the curve the headlights picked up the child just in front of the car.

Opinion

Defendant contends that she was not proved guilty beyond a reasonable doubt. Section 172, ch. 95-1/2, provides in part:

> (c) Notwithstanding the foregoing provisions of this Section every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any obviously confused or incapacitated person upon a roadway. [Emphasis supplied.]

Defendant's duty of "due care" as stated in Section 172 has been interpreted to mean the exercise of reasonable care based upon the standard of an ordinarily prudent person. See Leontsos v. Haase, 410 F.2d 633 (7th Cir. 1969) and Nagelmiller v. Seibel, 47 Ill. App.2d 39.

In the instant case the court found defendant not guilty on the charge of driving too fast for conditions. The evidence shows that Ridge Road curves near Sterling Lane; that the street lighting was only fair; that it was wet and snowy at the time of the accident; that defendant saw the child for only a fraction of a second before she heard a "thump"; that defendant immediately applied her brakes upon observing the child; and that defendant sought help from a neighbor and the police. From this evidence

and under all of the circumstances presented, we conclude that the State did not prove beyond a reasonable doubt that defendant failed to exercise proper precaution upon observing a child sitting in the middle of the street.

The judgment is reversed.

REVERSED

English, P.J., and Lorenz, J., concur.

Abstract only.

70-165

ERMAN DANDURAND VS AL HOFFMAN

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and seventy-one, within and for the Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on SEPTEMBER 7, 1971 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

No. 70-165

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1971.

HERMAN DANDURAND, Plaintiff-Appellee, vs. AL HOFFMAN and BIRDIE HOFFMAN, Defendants-Appellants.	)	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Chancery Division, Kankakee County. Honorable Herman W. Snow Judge Presiding.

ALLOY, P. J.

Abstract

This is an appeal from an order of the Circuit Court of Kankakee County entered on July 23, 1970, denying a motion to vacate an order entered on September 3, 1968 (which denied a motion to set aside a default judgment entered against defendants on January 26, 1968). The motion to vacate the order of September 3, 1968 was based on the ground that plaintiff, Herman Dandurand, died on August 3, 1968, prior to the entry of the order of September 3, 1968. The record shows that no party was substituted for plaintiff, Herman Dandurand, prior to the entry of such order of September 3, 1968. The decree entered on January 26, 1968, enjoined defendants, Al Hoffman and Birdie Hoffman, from diverting the natural flow of waters on their land and, also, found that defendants were responsible for damages resulting from such diversion. The action from which the appeal is taken was instituted under Section 72 of the Illinois Civil Practice Act (1969 Illinois Revised Statutes, Ch. 110, §72).

While the problems and approach taken by parties to this case seem to be rather obscure, it appears that the real object of defendants' action is an attempt to set aside the decree of January 26, 1968. Defendants claim that such decree was obtained without proper service on defendants and that defendants should have a right to set aside the default incident to the entry of such judgment. As indicated in the course of this opinion, we do not believe that the record supports defendants' claim.

A review of the facts is essential to an understanding of the present proceeding. On December 6, 1967, a complaint was filed by plaintiff, Herman Dandurand, asserting that defendants owned land adjoining the land of plaintiff, and, as a result of the diversion of the natural flow of waters by defendants on their land, plaintiff was damaged. The complaint asks not only for damages, but for an injunction against the continuance of the wrongful diversion of water. Summons was issued and the sheriff's return of service indicated that defendants were served personally on December 8, 1967, by leaving a copy of the complaint and summons with each defendant. Defendants did not appear in court in any manner. On January 19, 1968, plaintiff requested an order of default against such defendants and on January 26, 1968, the court, after having noted the return of service of summons, granted the motion of plaintiff. A judgment adjudicating the liability for damages on part of defendants, but not specifying an amount, and likewise ordering an immediate injunction pursuant to the complaint, was filed on January 26, 1968. The writ of injunction issued pursuant to the judgment on January 29, 1968, was served on defendants on January 30, 1968. On the following March 14, plaintiff petitioned for a rule on defendants to show cause why they should not be held in contempt for not complying with the order of January 26, 1968.

Defendants entered their appearance on March 29, 1968, and claimed that the summons was improperly served and, consequently, was void and moved to set aside the order for the writ, and to dismiss plaintiff's petition for the rule, and, also, requested permission to plead to the merits of the complaint. An answer and counterclaim were filed at the same time even though the petition for leave to file them was not granted. Plaintiff moved that defendants' motion be dismissed or denied. On May 10, the attorneys representing defendants were changed and new attorneys entered their appearance on behalf of defendants. On July 19, 1968, the trial court concluded that defendants' petition was not well-founded and that no legal cause was set forth which would warrant the vacation of the decree. The petition of defendants was denied and plaintiff's attorney was ordered to prepare a decree to give effect to the order. On July 26, 1968, a week later, an addendum was added to the July 19 opinion, adding certain language to be included in the court's decision to be incorporated in the decree to be prepared by plaintiff's attorney. On August 3, 1968, plaintiff died. On September 3, 1968, the court signed the order prepared by plaintiff's attorney denying defendants' petition. On October 3, 1968, defendants filed notice of appeal from the order of September 3, 1968. Nothing, however, was done to pursue such appeal. On November 21, 1968, the attorneys for plaintiff suggested the death of Herman Dandurand to the court and asked for substitution of the administrator. The attorneys asked leave to withdraw on the ground that the estate was being administered by another attorney and this attorney is now acting in the interest of the estate of plaintiff and in this proceeding.

On February 17, 1969, defendants' second counsel moved to withdraw and on December 9, 1969, defendants, by their third counsel, filed a

"reply" to plaintiff's March 14, 1968 petition for the rule to show cause. On December 17, 1969, the attorneys for plaintiff's estate filed, on behalf of plaintiff, another petition for rule on defendants to show cause why they should not be held in contempt for not observing the January 26, 1968 judgment. Also, on December 17, 1969, defendants moved, under Section 72 of the Civil Practice Act referred to, for relief from the January 26, 1968 judgment, and recited therein that defendants "have no knowledge as to what happened to the appeal of October 3, 1968, from the order of September 3, 1968".

On April 2, 1970, following a hearing on plaintiff's petition for the rule filed December 17, 1969, the court granted the rule requested by attorneys for plaintiff. Hearing on the rule to show cause, however, was continued. The third counsel for defendants had withdrawn and defendants' fourth counsel of record, who is counsel at this time on the appeal, entered his appearance on June 22, 1970.

On July 10, 1970, defendants amended the petition they had filed on December 17, 1969, under Section 72 of the Civil Practice Act, and requested that the decree of September 3, 1968, be declared null and void on the ground that plaintiff had died prior to the time it was entered and that no party had been substituted for the plaintiff. The court heard and denied this petition on July 23, 1970. Defendants filed notice of appeal from the court's decision.

On July 10, 1970, when defendants amended their petition under Section 72 (which had been filed originally on December 17, 1969), they requested vacation of the September 3, 1968 judgment and did not request any action as to the January 26, 1968 judgment. Since a petition under Section 72 must be filed not later than two years after entry of the order,

judgment or decree [1969 Illinois Revised Statutes, Ch. 110, §72 (3)], and since more than two years had elapsed since January 26, 1968, there is no longer a petition of record attacking the judgment of January 26, 1968, under Section 72 of the Practice Act. Even if the petition was still considered to be pending, we find no basis in the record for vacating, modifying, or reversing the decree of January 26, 1968.

It is also contended that the January 26, 1968, judgment was vulnerable on the ground that the court did not obtain jurisdiction of the persons of defendants. The court explicitly specified in its decree that the January 26, 1968 judgment was based upon a return of service as against said defendants and based on personal jurisdiction of each defendant. The mere assertion that defendants were not served is not a sufficient reason for setting aside such judgment in absence of facts justifying such action, and the trial court had already considered these allegations and had rejected them. As we have indicated, we find nothing in the record with respect to jurisdiction or any other grounds which would justify setting aside the decree of January 26, 1968.

We also note that defendants came into court acknowledging the court's jurisdiction by filing an answer and counterclaim to plaintiff's complaint and participated in each subsequent proceeding, including a reply to plaintiff's petition for a rule to show cause. In the petition under Section 72 there was an admission of the court's jurisdiction and, thereby, defendants have repeatedly placed themselves within the jurisdiction of the court and are bound by the judgment of January 26, 1968. The filing of the answer and counterclaim alone constituted a submission to the jurisdiction of the court (NEWTON v. LEHMAN, 67 Ill. App. 2d 302, 214 N.E. 2d 142; LORD v. HUBERT, 12 Ill. 2d 83, 145 N.E. 2d 77). There is no basis for

dismissal of the action in this cause. A substitution of the administrator of the plaintiff's estate as party-plaintiff should be authorized (YOUNG v. DAVIDSON, 129 Ill. App. 657).

We have, therefore, concluded that the judgment of July 23, 1970, as well as the judgment of September 3, 1968, should be vacated and that upon remandment the Kankakee County Circuit Court should be directed to approve the motion of plaintiff's administrator to be substituted for Herman Dandurand as party-plaintiff. Accordingly, for the reasons outlined, the judgments of July 23, 1970, and September 3, 1968, are vacated, and this cause is remanded for further procedure in the Circuit Court of Kankakee County in accordance with the views expressed in this opinion.

Reversed and Remanded with Directions.

Stouder, J. and Scott, J. concur.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 11371

Agenda No. 71-40

People of the State of Illinois,
Plaintiff-Appellee

vs.

Randall Lee Kirby,
Defendant-Appellant

Appeal from
Circuit Court
Macon County

CRAVEN, J., delivered the opinion of the court.

The Illinois Defender Project, court-appointed counsel for the defendant-appellant, has filed a motion for leave to withdraw, together with a brief, in accordance with the requirements of Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). It is the conclusion of counsel that there is no justiciable issue for review and any request for review would be frivolous.

The defendant, originally charged with sale, entered a plea of guilty to the charge of unlawful possession of marijuana in excess of 2.5 grams. Before accepting the plea, the trial court fully admonished the defendant as to the nature of the charge against him, the possible penalty, and his constitutional rights to a jury trial and to grand jury indictment.

We concur in the conclusion of counsel that this phase of the case presents no arguable issue on appeal.

Upon defendant's petition for probation, a thorough hearing was conducted by the trial court. The trial court considered a probation report and did consider evidence of prior criminal misconduct. Our examination of the record with reference to this proceeding suggests no error in the procedure there followed. See People v. Fuca, 43 Ill. 2d 182, 251 N.E.2d 239 (1969).

After the probation hearing and the denial of probation, the trial court asked prosecution and defense counsel whether either wanted to present evidence in aggravation and mitigation. Counsel for the defendant waived presentation of any evidence in mitigation. Sentence was thereafter imposed. We find no error in this procedure. Although a hearing on a petition for probation is distinct from a hearing in aggravation and mitigation, the latter hearing may be waived and a personal waiver by the defendant is not necessarily required. See: People v. Smith, 79 Ill. App. 2d 348, 223 N.E.2d 548 (2nd Dist. 1967); People v. Spaulding, 75 Ill. App. 2d 378, 220 N.E.2d 331 (4th Dist. 1966). A hearing in aggravation and mitigation may be waived by counsel under the circumstances existent in this case. See: People v. Sailor, 43 Ill. 2d 256, 253 N.E.2d 397 (1969); People v. Tolmel, ___ Ill. App. 2d ___, 268 N.E.2d 875 (4th Dist. 1971).

Finally, with reference to the issue of sentence, no contention can be made that the sentence here imposed is excessive. The minimum sentence provided by statute was imposed. No arguable issue can be presented with reference to a reduction of the maximum.

Our examination of this record leads us to the conclusion that counsel was correct in reaching the conclusion that this record suggests no meritorious grounds for appeal. The motion to withdraw is allowed and the judgment of the Circuit Court of Macon County is affirmed.

Judgment affirmed.

SMITH, P.J., and TRAPP, J., concur.

General No. 11428 Agenda No. 71-2-4

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

People of the State of Illinois, Plaintiff-Appellee	)	Appeal from
vs.	)	Circuit Court
Danny Wallace, Defendant-Appellant	)	Menard County

Smith, P.J.

The Illinois Defender Project moved to withdraw as defendant's counsel and accompanied the motion with a brief in conformity with Anders v. State of California, 386 US 738, 18 L ed 2d 493, 87 S Ct 1396. Defendant's counsel represents that the record shows only two possible arguable points for review. The first is that there were irregularities in the defendant's plea of guilty to a charge of contributing to the delinquency of a minor which was one of the grounds assigned for revoking probation and (2) that some improper evidence was received by the court in connection with the hearing in aggravation and mitigation.

The record discloses that the defendant had pleaded guilty to a charge of theft over $150 and had been admitted to probation for two years in Menard County. A petition was filed charging the defendant with violating the terms of his probation, for failure to report to his probation officer and failure to make restitution payments as required by the order. The defendant made full restitution and his probation was continued. Subsequently a second petition was filed charging him again with violating the terms of his probation in that he committed the offenses of criminal trespass to vehicles and contributing to the delinquency of a minor child. A hearing was held on these matters and probation was revoked. Thereafter a hearing in aggravation and mitigation was conducted and the defendant was sentenced to the Illinois State Penitentiary for a term of one to four years.

The defendant testified at the probation revocation hearing that he pleaded guilty to a charge of contributing to the delinquency of a minor on the assurance by the Assistant State's Attorney of Sangamon County that his probation in Menard County would not be revoked. However, the day after the plea in Sangamon County was entered and the defendant was sentenced, a petition charging violation of probation was filed in Menard County by the defendant's probation officer. The State's Attorney in that county denied having made any promises not to revoke defendant's probation and the Sangamon County Assistant State's Attorney

testified that he had made no such representation to the defendant. The record pretty well establishes just the opposite of the defendant's contention and the court so held. The validity or invalidity of a plea of this charge is not before us nor is it basically even material.

The defendant objected to the entire hearing in aggravation and mitigation and waived the opportunity to present mitigating evidence in his own behalf. The record contains adequate information concerning the original offense, evidence concerning the defendant's arrest for contributing to the delinquency of a minor, testimony of the probation officer that the defendant had frequently failed to report as required by the probation officer, the police report of the incident and the defendant's signed confession. The sentence imposed of one to four years was minimal and of sufficient spread to satisfy accepted standards. It is, of course, fundamental that the court may not consider acts which lead to the revocation of probation in determining the sentence on the original charge since that sentence is for the original offense only. People v. White, 93 Ill. App.2d 283, 235 NE2d 393. The record supports no violation of this principle.

In the discharge of our duties, we, too, have examined this record and agree that an appeal in this case is wholly frivolous and without merit. Accordingly, the petition of the Illinois Defender Project to withdraw as counsel for the defendant-appellant is allowed and the order of the trial court revoking probation and sentencing the defendant is affirmed.

Affirmed.

Craven, J. and Trapp, J. concur.

No. 69-127

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WILLIAM BELINSKI, Plaintiff-Appellee, Cross Appellant, -vs- THE CITY NATIONAL BANK OF CENTRALIA, Centralia, Illinois, Defendant-Appellant, Cross Appellee.	Appeal from the Circuit Court for The Fourth Judicial District, Marion County. Honorable Raymond O. Horn, Trial Judge.

George J. Moran, J.

Before considering the merits of this case, we must first determine whether this appeal should be dismissed because of the parties' failure to file timely notices of appeal.

Plaintiff, William Belinski, brought this action against defendant, The City National Bank of Centralia, to recover possession of a 1965 Plymouth automobile and certificate of title and for real and punitive damages for deprivation of his use of the automobile.

After evidence was taken in a trial before the court without a jury and briefs were submitted, the trial court wrote a letter to counsel for both parties indicating his decision that defendant should convey the automobile and its title to plaintiff and that each party pay his own costs and attorney fees and that defendant was not responsible for other damages to plaintiff. The last sentence of the letter stated: "If counsel will prepare a formal order in accordance with these findings, I will enter same." This letter was dated May 19, 1969 and filed on May 20, 1969. On May 28 plaintiff filed a motion to reconsider that portion of the court's decision that plaintiff is not entitled to judgment for damages for loss of use of the automobile or in the alternative that the court enter an order finding the amount of damages which plaintiff has suffered by loss of use of the automobile in the event that the Appellate Court would find that plaintiff is entitled to such

damages. On June 16, 1969 defendant filed a notice of appeal from the written opinion filed on May 20. Thereafter, on August 11, 1969, the court entered a formal order dated August 4 in accordance with the written opinion of May 20. On November 4, 1969 plaintiff's motion to reconsider was denied and defendant was given thirty days from that date to effect an appeal. On November 24, plaintiff filed a notice of appeal from the order entered on August 4 and filed on August 11 and from the order entered November 4 denying plaintiff's motion to reconsider.

Supreme Court Rule 303 (Ill. Rev. Stat. 1969, Chap. 110A, Sec. 303(a)) provides:

> "The notice of appeal must be filed with the clerk of the circuit court within thirty days after the entry of the final judgment appealed from, or, if a timely post-trial motion directed against the judgment is filed, whether in a jury or a non-jury case, within thirty days after the entry of the order disposing of the motion."

The filing of a notice of appeal within the period limited by statute is mandatory and jurisdictional. Oak Park National Bank v. Kiley, 78 Ill App 2d 236; Werbeck v. Werbeck, 70 Ill App 2d 279. Since neither party filed a timely notice of appeal in this case, their appeals must be dismissed.

Supreme Court Rule 272 (Ill. Rev. Stat. 1969, Chap. 110A, Sec. 272) provides:

> "If at the time of announcing final judgment the judge requires the submission of a form of written judgment to be signed by him, the clerk shall make a notation to that effect and the judgment becomes final only when the signed judgment is filed. If no such signed written judgment is to be filed, the judge or clerk shall forthwith make a notation of judgment and enter the judgment of record promptly, and the judgment is entered at the time it is entered of record."

The Committee Comments to that section state:

> "This rule is new. Its purpose is to remove any doubt as to the date a judgment is entered. It applies to both law and equity, and the distinction stated in Freeport Motor Casualty Co. v. Tharp, 406 Ill 295, as to the effective dates of a judgment at law and decree in equity is abolished."

Applying this rule to the present case, it is clear that the judgment of the trial court became final on August 11, 1969 when the formal order signed by the trial

judge was entered, and not upon the filing or entry of the written opinion of the court on May 20, which required the submission of a form of written judgment to be entered by the court. Therefore a notice of appeal would have to be filed within thirty days after August 11 to be considered timely unless that time were stayed by the filing of a timely post trial motion.

Rule 303 provides that notice of appeal may be filed within thirty days after the entry of an order disposing of a timely post trial motion directed against the judgment and Section 68.3(2) of the Civil Practice Act (Ill. Rev. Stat. 1969, Chap. 110, Sec. 68.3(2)) provides that:

> "A motion filed in apt time stays execution, and the time for appeal from a decree or judgment does not begin to run until the court rules upon the motion, . . . " (Emphasis added.)

Section 68.3(1) (Ill. Rev. Stat. 1969, Chap. 110, Sec. 68.3(1)) provides:

> "(1) In chancery cases and in cases at law tried without a jury, any party may, within 30 days after the entry of the decree of judgment, file a motion for a rehearing, or a retrial, or modification of the decree or judgment or to vacate the decree or judgment or for other relief."

Plaintiff's motion to reconsider was filed on May 28 before the entry of final judgment on August 11. This motion was not filed within thirty days after the entry of judgment and on May 28 there was no final judgment against which such a motion could be based. Therefore, plaintiff's motion was not timely or in apt time and it did not stay the time for filing a notice of appeal. Plaintiff's time for filing the notice of appeal expired thirty days after August 11 as did defendant's. Since no action was taken by either party within that time, the trial court lost jurisdiction of the case and the orders entered by it more than thirty days after August 11 are a nullity.

Accordingly, we find that these appeals must be dismissed.

Appeals dismissed.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Charles E. Jones

PUBLISH ABSTRACT ONLY.

No. 70-10

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

KENNETH LEE GROVE, Plaintiff-Appellee, -vs- MARY AGNES GROVE, a/k/a MARY AGNES CUNNINGHAM, Defendant-Appellant.	Appeal from the Second Judicial Circuit, Richland County, Illinois. Honorable Carrie L. Winter, Judge Presiding.

George J. Moran, J.

Plaintiff, Kenneth Lee Grove, filed a complaint for divorce in the Circuit Court of Richland County against defendant, Mary Agnes Grove, a/k/a Mary Agnes Cunningham, based on extreme and repeated mental cruelty, on April 10, 1969. Defendant filed an entry of appearance and after a hearing at which defendant did not appear, the divorce was granted and plaintiff was awarded custody of their three minor children, Kevin, age 10, Sherry, age 8, and Regina, age 6. Subsequently on July 9, 1969 defendant filed a petition to modify the custody provisions of the decree which was denied by the trial court and defendant appeals.

The evidence in this case discloses the development of a unique family situation. Following the divorce, defendant married one Charles Franklin Cunningham on June 1, 1969, who was and is in custody of his four minor children from a previous marriage which had also been dissolved sometime in April, 1969. On July 3, 1969 Charles Franklin Cunningham's former wife, Sue Cunningham, nee Crackel, married Kenneth Grove, the plaintiff in this action. The result of these events is that the fathers have retained custody of their respective children and have stayed in their former homes and that the mothers have exchanged places with each other.

Defendant testified that prior to their divorce, she and plaintiff discussed the custody of the children. She stated that he told her that he would retain custody of the children throughout the summer and that she would have custody during the school year. She did not remember any qualifications on this statement. She

testified that she felt that plaintiff would live up to this agreement, and based on this statement she did not consult counsel regarding this matter until after plainti told her he would not give her custody of the children during the school year.

Plaintiff testified as follows:

> "It all started. She wanted a divorce and I tried to talk her out of it so she, there is no way of cancellation of that, that was it. That was the way it was going to be. She told me she would file for a divorce, I told her I wouldn't let her have it. I would stop it any way I could. She was going to file to get the custody of the kids. I told her the only way I would let her have a divorce would be, I would file and I would take care of the kids. I didn't feel she was stable enough. I didn't know what she was going to do next, I had no idea. We made the agreement that I would take care of the kids in the summer and she would have them while they went to school if I felt she could take care of them, and that would be best for them."

Plaintiff further testified that he did feel that it was in the best interests of the children not to let defendant have custody because she is now married to Charles Cunningham and has custody of their four children and continues to work in Cunningham's business where she worked before the divorce.

On cross examination defendant testified that she did not give plaintiff a divorce based on these statements and that the divorce had been requested by her. She testified:

> "Q. Did Mr. Grove tell you that at that time he would let you have the children for school whether or not you were in a position to handle it?
>
> A. I don't remember that. I don't know what he means 'be qualified.'
>
> Q. He would let you have them if and when he thought you were able to take care of them.
>
> A. Yes.
>
> Q. At that time you didn't have any idea of getting married then?
>
> A. No.

On several occasions after their divorce, mostly on Friday nights, defendant went to plaintiff's home to take care of the children while plaintiff went out socially. On several of these occasions when plaintiff returned after drinking they had serious arguments, sometimes involving physical altercations. Nevertheless, defendant testified, plaintiff was a good father prior to the divorce

and defendant's primary concern seems to be that Sue Grove, formerly Sue Cunningham, is not a fit person to be a stepmother of the children.

Defendant also testified that plaintiff agreed to give her $30.00 per week toward the support of the children. Plaintiff admitted that he agreed to contribute to their support but does not remember the amount.

There was testimony that Sue Grove, during her previous marriage, had left their home on several occasions without warning, sometimes leaving the children at home alone and had stayed away from home for as much as several weeks. On two of these occasions when she was found and returned home she was placed in a mental hospital. During that time she was apparently under certain medication. Charles Cunningham testified that his former wife was not always attentive to the children after October, 1968 and would not always fix their meals.

However, Verna Schwartz and Thelma Hubbel, two of plaintiff's sisters, testified that they had been in the Grove home since plaintiff's second marriage and that Sue Grové has been affectionate and considerate of the Grove children and that she has been a very good housekeeper. Neither of them knew her before June of 1969. Sue Grove's father, Ralph Crackel, testified that there is no similarity in her conduct before her divorce and after. He testified that she appears to be very happy in her new marriage and no longer seems to be under a strain as she did before. Farris Crackel, the mother of Sue Grove, testified that her daughter is happier now, and that she has no difficulty with the Grove children and gets along well with them. Plaintiff testified that he knew of his present wife's background when he married her. He said that she takes good care of the house and children and is no longer under any medication.

All of the evidence indicates that the three Grove children have adjusted very well to the series of events in this case. They all do well in school and their schoolwork has not been affected by these changes. They get along well with their stepmother, Sue Grove, and also with the Cunningham children whom they have spent some time with on vacations and on week-ends. In addition, both fathers have been shown to be fit and proper persons to have the custody of the

children. Both of them work and maintain homes which are adequate for raising a family. Plaintiff testified that on one occasion in 1967, defendant had run away from home for some time and upon her return brought a young man with her, indicating that she may have wanted a divorce at that time. This situation was temporarily reconciled.

Charles Cunningham testified that they had his four children by a former marriage and that he is willing to take the three Grove children into his home. He stated that all of the children were healthy and well-adjusted.

We would be less than sophisticated if we failed to appreciate the difficulty the circuit court had in resolving the question of custody in this case. The trial court, of course, saw and heard the witnesses and after a consideration of all the evidence determined that the best interests of the children would be best served if they remained in the custody of the plaintiff. Under these circumstances we would not want to say that the court was in error in this determination.

It is true as defendant argues and as established in Nye v. Nye, 411 Ill 408, that ordinarily the welfare of children is better served by placing them in the custody of their mother if she is a fit and proper person to rear the children. However, it is also established in Nye v. Nye that the trial court is clothed with a large discretion in determining which parent will be given custody of children and it is further established that custody may be denied the mother where there is a positive showing that it would be to the best interests of the children. As we have stated, this is a unique and peculiar family situation requiring the application of good, common sense for its resolution. It is clear that defendant in her position as stepmother in the Cunningham family has custody of the four Cunningham children and that she is also working in Charles Cunningham's business as she did previously, and that both Charles Cunningham and the defendant are fit and proper persons to have custody of children. It is further established by the evidence that plaintiff has married Sue Cunningham and has maintained the children in his home where they lived prior to his divorce. During the brief period of this marriage, Sue Grove has shown herself to be a proper person to care for the Grove children.

There is no indication of future misconduct on her part and the trial court must have been assured of this fact. The Crove children are all healthy and do well in school and are well-adjusted to this change in their family relationship. Under all of these circumstances, we cannot say that the trial court has abused its discretion or that its findings are contrary to the manifest weight of the evidence in placing the children in the custody of plaintiff.

At the close of all the evidence the trial court stated:

> "The judge has quite a problem here. It is my duty to consider the evidence in regard to the children. There has been no evidence at the present time there should be any change. I want to be very sure it is for the very best interest of the children. I am going to get an investigative report which I will give both attorneys. I will make my decision then."

Defendant contends that the court erred in the use of an investigative report which does not appear in the record and which was not available for cross examination, relying on DesChatelets v. DesChatelets, 292 Ill App 357. The report does not appear in the record and there is no indication that the court referred to it in fact. At the close of the evidence the court indicated that there had been insufficient evidence presented to justify a change in the custody and we concur in this statement of the court. Assuming that the court later considered an investigative report not in the record, it is obvious that such consideration did not and could not have affected the result in this case, and could not have been prejudicial to the defendant.

Defendant also contends that because of the summary nature of the proceedings and evidence on which the original custody provision was entered giving custody to plaintiff, that that provision should be disregarded and should not be given a presumptive validity which defendant would have to overcome by showing a change in circumstances in order to warrant modification of the decree. The defendant emphasizes the promises admittedly made by plaintiff to defendant that she could have custody of the children during the school year and defendant's reliance on these statements in failing to consult counsel to protect her interests in this regard. However, defendant has not filed a petition to vacate the custody provisions based on fraud and concealment, but has sought only to modify them

based on the present circumstances existing in these two families. Furthermore, the trial court would not be bound by any tentaive agreement by the parties if it believed that such an agreement existed, but would be free to make an independent judgment as to how the interests of the children would best be served. We believe that the trial court in its discretion made the proper determination with the admonition that this order is always subject to the future supervision of the trial court in the event of a change in circumstances affecting the welfare of these children. Accordingly, the judgment of the Circuit Court of Richland County is affirmed.

Judgment affirmed.

CONCUR:

Honorable Charles E. Jones

Honorable Edward C. Eberspacher

PUBLISH ABSTRACT ONLY.

No. 71-3

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CHARLES and ANN SALVAGGIO, Plaintiffs-Appellees, -vs- BLANCHE SCHAFROTH, Defendant-Appellant.	Appeal from the Circuit Court of Williamson County - First Judicial Circuit. Honorable A. R. Cagle, Judge Presiding.

Per Curiam.

Plaintiffs, Charles and Ann Salvaggio, brought this action by a small claims complaint in the Circuit Court of Williamson County against defendant Blanche Schafroth for wages allegedly wrongfully withheld. After the case was heard without a jury, the trial court entered judgment in favor of plaintiffs in the sum of $90.00 and costs of $17.00 and defendant appeals.

The evidence shows that plaintiffs answered an advertisement on August 26, 1970 placed by defendant seeking a housekeeper and valet to help take care of her semi-invalid husband. After filling out an application for employment, the parties agreed to perform these services for $350.00 per month plus room and board to begin on September 7, 1970. Nothing was said at that time regarding the use of any of defendant's automobiles and plaintiffs represented that they had an automobile of their own to use. On September 6, Charles Salvaggio called defendant and told her that his car was in the garage and asked if he could use one of her cars while theirs was being fixed. He stated that she told him over the telephone that they could use one of her cars, a Mustang, which was not being used anyway, and that it was costing her approximately $5.00 a day to keep it in the garage, but they were to pay for the gas. They began work on September 7 and performed their duties until September 25 when they were discharged. Throughout this time they used defendant's Mustang for their personal use as well as for performing duties which they were required to do as part of their

employment. In all, they drove the Mustang and defendant's other cars 900 to 1,000 miles and during this time they paid for their gas.

Defendant, who is a licensed physician but does not practice medicine, testified that when Charles Salvaggio called her on September 6 and asked to use her car, she told him he could, but it would cost him $5.00 a day and he would have to pay for his gas. He asked her whether her insurance would cover him and she responded that it would. She testified that they used the Mustang every night as well as the other cars for various errands.

Shortly after their discharge, plaintiffs received a check from defendant for $120.31. On the face of the check were the notations: "Credit $221.54 for housework at farm house from 9/7 to 9/25/70; debit $11.66 social security; $90.00 car rental for 18 days at $5.00 per day; 60¢ for telephone calls." On the back of the check, above plaintiffs' endorsements, was typed the following release:

> "Endorsement of this check constitutes a release in full and acquits and forever discharges Werner and Blanche Schafroth of and from any and all claims, actions, demands, rights, damages, costs, and any and all liability or compensation whatsoever, which the undersigned now has or which may hereafter arise on account of or in any way growing out of the employment of the undersigned by Werner and Blanche Schafroth."

Charles Salvaggio, who is a college graduate, testified that he read and fully understood the meaning of the release, but that he and his wife needed the money and decided to cash the check even though they had anticipated their wages for their brief employment would be approximately $210.00 and that they had not anticipated a deduction for use of the car. He testified there was no such agreement to pay defendant $5.00 a day for the use of the car, but they cashed the check even though they felt the wages were wrongfully withheld.

Defendant contends that the execution of the release by endorsing the check bars plaintiffs from this cause of action and that the determination of the trial court that there was no agreement that plaintiffs pay $5.00 per day as rental for the Mustang, is contrary to the manifest weight of the evidence and should be reversed.

It is hornbook law that a release not under seal must be supported by a valid consideration to be enforceable. Toffenetti v. Mellor, 323 Ill 143; Corbin on Contracts, Sec. 1238, One Volume Edition, 1952. There is no dispute that defendant owed plaintiffs at least the $120.31 which was paid to them by the check which they endorsed containing the release. By paying this amount, defendant has suffered no legal detriment in doing what she was already bound to do and the plaintiffs have received no legal benefit by endorsing the check and receiving the payment to which they were already entitled. Since defendant suffered no additional legal detriment and plaintiffs received no additional legal benefit for the release, it is unsupported by valid consideration and therefore unenforceable.

The evidence, as noted by the trial judge, is conflicting on the issue whether such an agreement existed and the resolution of that factual issue was for the trial court. On the state of this record, we cannot say it is contrary to the manifest weight of the evidence, since there is evidence from which the trial court could conclude that there was a misunderstanding as to the arrangement for the use of the car and that no such agreement existed.

Accordingly, the judgment of the Circuit Court of Williamson County is affirmed.

Judgment affirmed.

Publish Abstract Only.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE HAROLD F. TRAPP, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 19th day of November A. D. 19 70, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11268 Agenda No. 70-60

People of the State of Illinois,
Plaintiff-Appellee
vs.
Roy Dotson, Sr.,
Defendant-Appellant

Appeal from
Circuit Court
Macon County

CRAVEN, P.J., delivered the opinion of the court.

The defendant appeals a sentence of not less than two nor more than ten years in the State penitentiary entered upon a plea of guilty to the offense of involuntary manslaughter. It is his contention that the trial court abused its discretion in failing to grant probation.

In August of 1969, the defendant, aged 36 years, his wife and a son lived in Decatur, Illinois, together with one Paul E. Miller, the defendant's stepson, then aged 16 years. In the afternoon of August 28, the son and stepson were playing and fighting in the yard, and apparently Paul Miller caused a dog to bite Roy Dotson, Jr. An uncle went to the place of employment

of the defendant and advised him as to what had happened. The defendant went home, took the son to the hospital for treatment, and on the way home from the hospital stopped at a store where he met Paul E. Miller. An argument ensued which apparently continued there and at the home until approximately one o'clock in the morning, at which time there was a shooting resulting in the death of Paul E. Miller. The trial court heard extensive testimony as to the facts and circumstances of this situational offense, notwithstanding the plea of guilty, and was fully informed as to the offense. Upon the defendant pleading guilty to involuntary manslaughter, a charge of voluntary manslaughter was dismissed.

After the initial probation hearing, the court entered an order denying probation and set the case for a later date for hearing in aggravation and mitigation. At the time of that hearing, on application of the defendant, the question of probation was re-examined and additional witnesses were heard. At the conclusion of that second hearing, probation was denied and the indicated sentence was imposed. This appeal follows.

The granting or revoking of probation is normally a matter within the discretion of the trial court but, as observed in People v. McAndrew, 96 Ill. App. 2d 441, 239 N.E.2d 314 (2nd Dist. 1968), is subject to review to the extent of determining whether the trial court did exercise discretion in its determination on the issue of probation or whether it abused such discretion and acted in an arbitrary manner. In McAndrew the trial

court was found to have abused its discretion in its determination relative to the petition for probation. Because of that, that cause was remanded for reconsideration on the issue of probation.

In this case the record is complete with reference to an extensive hearing, and while we need not recite the evidence in detail, it is clear that all parties were afforded full opportunity to present evidence for consideration by the court. A probation report was on file and the probation officer testified. The court was informed as to the offender, the offense, the circumstances surrounding the offense, and the history and background of both the defendant and the victim. Any reversal by this court of the action of the trial court would have to be predicated upon a finding of an abuse of discretion, and we find no such abuse.

The defendant cites People v. Carleton, 116 Ill. App. 2d 450, 252 N.E.2d 702 (4th Dist. 1969), as authority for the proposition that this court can determine that the denial of probation was an abuse of discretion. In Carleton the action of this court was predicated upon a change in the penalty provisions of a statute between the time of the plea of guilty and sentence and the time of review. That circumstance, and that circumstance alone, was the basis for the remandment for further consideration. No such circumstance exists here.

The sentence here imposed was within the statutory limits, one authorized by law and not one that clearly appears to constitute such a great departure from the fundamental law as to require intervention by this court. We find no abuse of discretion. The order denying probation and the judgment of the Circuit Court of Macon County are affirmed.

Judgment affirmed.

SMITH and TRAPP, JJ., concur.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 24th day of June A. D. 19 71, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11454 Agenda No. 71-69

People of the State of Illinois,
Plaintiff-Appellee

vs.

Norman John Fields,
Defendant-Appellant

Appeal from
Circuit Court
McLean County

CRAVEN, J., delivered the opinion of the court.

The defendant was convicted upon his plea of guilty to the charge of burglary. There was no petition for probation and no hearing in aggravation and mitigation, as such, the same having been expressly waived. Prior to sentencing, however, the trial court did hear a statement from the prosecution as to the facts and circumstances of the offense and the defendant's prior record together with a recommendation as to sentence. A recommendation by defendant's court-appointed counsel was heard. It was the same as that of the prosecution. The court, acting in accord with the recommendation, sentenced the defendant to a term of not less than one year nor more than eighteen months in the Illinois State Penitentiary. The defendant was 26 years old.

The Illinois Defender Project, as court-appointed counsel for the defendant in this appeal, has filed a motion to withdraw as counsel supported by a brief and memorandum of authorities in support of the motion, in accordance with Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

The brief and memorandum suggest certain points with reference to the empaneling of the grand jury, the sufficiency of the indictment, the arraignment procedure, the sufficiency of the admonitions prior to the acceptance of the plea, the explanation of the possible penalty or sentence and in each instance conclude that the record contains no error, and each contention is supported by appropriate authority.

We have examined the record with reference to the enumerated points, and we concur in the conclusion of counsel that this record does not present any issues realistically arguable in this appeal. Counsel is not required to pursue a wholly frivolous appeal. The motion to withdraw is allowed and the judgment of the Circuit Court of McLean County is affirmed.

Judgment affirmed.

SMITH, P.J. and TRAPP, J., concur.

54151

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
DAVID BRIAN ROPER,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Hon. L. Sheldon Brown, Presiding.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

David Brian Roper, defendant, was indicted for the murder of Frank Sowa, III. At that time, defendant was approximately 19 years old. After a jury trial, defendant was found not guilty of murder and guilty of voluntary manslaughter. He was sentenced to the penitentiary for 5 to 20 years.

Defendant was invited to a party given by a young lady at her home about a block from where he lived in Glenview, Illinois. On that date, June 22, 1968, defendant was a private in the United States Army. He had been accepted for study at the United States Military Academy at West Point and was to report there on July 1st.

Whatever the reason for this social gathering, there were ample supplies of beer and whiskey for all present. During the evening, defendant drank three or four drinks described as a mixture of beer and whiskey, while the deceased drank one can of beer. There were about twelve young men and women at the party. The hostess had known the deceased for about one and a half years and she had also gone out with defendant once or twice. At the party, she introduced defendant to the deceased. They had not previously been acquainted.

At one point in the evening, defendant was playing pool in a basement recreation room with another guest named Bruce Drennan. Drennan complained that defendant took too long between shots. Defendant left to go upstairs and returned after eight or ten minutes. He then accused Drennan of altering the position of the pool balls. There is testimony that Drennan had not actually

moved the balls. An argument ensued between Drennan and defendant. There is testimony that defendant suggested that he and Drennan should go "upstairs and have it out."

Defendant, the hostess, Drennan and deceased then went up to the kitchen together. Defendant punched at Drennan. The hostess attempted to intervene but was pushed back by defendant. At this point, the deceased suggested that if defendant wished to pick a fight it should be with him. Accordingly, defendant and the deceased went outside to the front lawn and commenced a fight. The hostess went out, pushed defendant away and told him that he should leave. At the time the hostess intervened, deceased was on the ground and defendant was on top of him. During this fight, Drennan remained in the house. Defendant left to go home.

A few minutes later, the hostess received a telephone call from a neighbor who had seen defendant doing something to automobiles owned by Drennan and deceased and parked outside. Deceased, Drennan and the hostess ran out of the house toward the cars. Defendant jumped up from the right side of one of the cars and began to run. He was pursued by Drennan and the deceased, with the deceased in front. The three of them ran down the block and around the corner.

From this point on, the only witnesses were Drennan and the defendant. Drennan testified that when he and deceased came around the corner, defendant had stopped and was waiting. Neither Drennan nor deceased had anything in their hands. The defendant had a baseball bat in his hand. Deceased was approximately 10 feet ahead of Drennan. He and Drennan slowed down and almost stopped. Defendant swung the bat and struck the deceased on the left side of his head. Deceased fell to the ground and screamed. Defendant continued to hold the bat and then said to Drennan,

"Come on, Bruce, do you want some too?" Drennan turned and ran back toward the house. Defendant started to chase him but then stopped. The deceased ran or staggered back to the house. He was bleeding from his mouth.

The deceased was operated on the following night. He remained in a deep coma after surgery and died, some eight days later, on July 1, 1968. The precise cause of death was cerebral laceration caused by a fracture of the skull.

Defendant testified in his own behalf. As stated in the brief filed by his counsel, his version of the facts has points of difference from the testimony for the People. Defendant testified that when he returned to the pool table during the game with Drennan, he was "pretty sure" that the position of the balls had been changed. He remonstrated with Drennan. Their conversation culminated when defendant said, "Let's go upstairs and have a talk.". They went upstairs and an argument ensued. Defendant punched at Drennan but missed. Drennan, however, hit defendant in the face. The hostess and her grandfather then separated them.

The deceased then accosted defendant and said, "any beef you have is with me." Defendant then started for the door and walked out to leave the party. Deceased followed and seized defendant by the arm. Defendant apologized and said that he just wanted to go home. Deceased kept pushing and shoving defendant until a fight commenced on the lawn. Defendant's shirt was ripped and both of them fell to the ground. At that time, they were half on the grass and half on a concrete parkway. When deceased fell, he struck his head on the concrete and his head, "kind of bounced up." Defendant testified that, during this fight, deceased kicked him in the stomach and in the groin. The hostess then came out and the fight stopped.

Defendant further testified that he then went home and changed his clothes. He returned to the vicinity of the cars

parked at the party. On the way, he picked up a stick about 3 feet long and 1-1/2 to 2 inches square. Defendant let the air out of the tires on two cars and emptied the contents of the glove compartment of one. In this regard, other evidence shows that the contents of a fire extinguisher had been sprayed into one car and the gas pedal of another had been broken off.

Defendant further testified that then he looked up and saw three men running toward him. He ran down the block, then turned and saw someone coming toward him. Defendant said, "It looked as if I didn't have any place to run so I just turned and with one motion swung at the person behind me." He did not see this person before he swung. He struck this person with his stick and the deceased dropped to his knees. Defendant started walking back toward his home without any conversation with Drennan. Defendant was clear in his testimony that the deceased was moving toward him when he struck out with the stick. The weapon used in the homicide was not produced. The police were unable to recover it despite investigation.

It should be noted that the record contains testimony of six character witnesses. All of them testified that defendant had a good or excellent reputation for truthfulness as well as for being a peaceful and law abiding citizen.

The court gave the jury four forms of verdict. These were guilty and not guilty for the crimes of murder and voluntary manslaughter. The jury found defendant not guilty of murder and guilty of voluntary manslaughter. Defendant makes six contentions regarding trial error and also has argued that the sentence was excessive. Each of these contentions will be considered in order.

Defendant first argues that he was not proved guilty of voluntary manslaughter beyond a reasonable doubt. The gist of

this argument is that defendant was not guilty of voluntary manslaughter because there was no "serious provocation" as required by the statute. (C 38, §9-2(a)). As we will note later, the jury was instructed by the trial court with reference to the crimes of murder and voluntary manslaughter. The indictment charged defendant only with murder but it is virtually elementary in Illinois, "that the crime of voluntary manslaughter is embraced by and is a lesser included offense of the charge of murder; and that an accused may be convicted of manslaughter under an indictment for murder." People v. Pratt, 46 Ill 2d 99, 102 and cases there cited.

Even a brief analysis of the evidence is a cogent demonstration of its sufficiency to justify a verdict of voluntary manslaughter beyond reasonable doubt. According to defendant's own testimony, events during the entire night show that defendant acted under sudden and intense passion resulting from serious and continuous provocation by the deceased. This evidence is that the deceased not only provoked a fight but kicked him despite his apology and although he stated his peaceful intentions and his desire to return home. In addition, the pursuit of defendant by deceased and another young man would constitute an assault which might well be deemed a sufficiently serious provocation. In this regard, it must be remembered that the existence of provocation is a factual issue. People v. Hurst, 42 Ill 2d 217, 221; People v. Irvin, 115 Ill App 2d 332; People v. Thomas, 93 Ill App 2d 77, 81; People v. Gajda, 87 Ill App 2d 316, 322. Therefore, it was the duty of the jury to determine whether there was or was not sufficient provocation. The verdict is amply supported by competent evidence and by the defendant's own testimony.

Defendant urges that we consider the case at bar "in the light of People v. McMurry, 64 Ill App 2d 248." Unfortunately for this contention, the cases are entirely different. In McMurry, there was no evidence "that the defendant was acting under an

intense passion caused by the kind of provocation contemplated by the statute." 64 Ill App 2d at page 251. There, the defendant was either guilty of murder or he was completely innocent. His counsel objected to any instruction given to the jury on manslaughter and objected to submission of a verdict form on manslaughter.

Quite to the contrary, in the case at bar, the defendant tendered an instruction on the issues in the crime of voluntary manslaughter which was given by the court. Defendant's given Instruction No. 18, IPI-Criminal 7.04. State's Instruction No. 15 defining voluntary manslaughter (IPI-Criminal 7.03 and 7.05) was given without objection by defendant. Two verdicts bearing upon voluntary manslaughter were given to the jury without objection by defendant. At the conclusion of the State's case, defendant moved the court to direct a verdict finding defendant not guilty of murder; and, alternatively, to direct a verdict finding defendant guilty of voluntary manslaughter. Defendant cannot try his case before the jury on one theory and then depart upon a radically new direction with adoption of an inconsistent theory on appeal. Johnson v. United States, 318 U S 189, 201; People v. Realmo, 28 Ill 2d 510, 512; People v. Ramos, 112 Ill App 2d 330, 339. Since defendant himself actually invited, procured, participated and acquiesced in the alleged error, he cannot now use it as an attempted vehicle for reversal. People v. Greer, 30 Ill 2d 415, 418; People v. Savage, 102 Ill App 2d 88, 101; People v. Melero, 99 Ill App 2d 208, 212; People v. Jennings, 84 Ill App 2d 33, 43.

Defendant's second contention is directed to the alleged lack of evidence regarding justifiable use of force. On motion of the State, and over the objection of defendant, the court gave the following instruction (State No. 11):

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.
>
> "However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself."

This instruction is based upon the Criminal Code (C 38, §7-1). See IPI-Criminal 24.06 page 419. Defendant's criticism of this instruction is that it was not supported by the evidence. This claim must be rejected. As shown, it was the theory of the People that defendant, armed with a bat, turned upon his pursuers and struck the deceased. On the contrary, defendant testified that he was in effect cornered by the deceased and his onrushing friend and that he struck out in an attempt to defend himself. Under this evidence, defendant's contention may not stand. The authorities cited by defendant in this regard are inapplicable. They pertain to situations in which there were no facts whatsoever upon which to base the instructions as given by the court. People v. Organ, 345 Ill 339 and People v. Black, 309 Ill 354.

Furthermore, as pointed out in the State's brief, defendant tendered two instructions which were rejected by the trial court as a proper precaution against duplication. People v. Stringer, 129 Ill App 2d 251, 270. Defendant's refused Instruction No. 23 is word for word identical with the first paragraph of State's Instruction No. 11 as reproduced above. Also, defendant's refused Instruction No. 14 is quite similar in language and in effect to the second paragraph of State's given Instruction No. 11. Since defendant has himself tendered other instructions so similar to the instruction in question, he should not now be heard to object. People v. Riley, 31 Ill 2d 490, 495; People v. Kelley, 105 Ill App 2d 481, 485; People v. Watts, 81 Ill App 2d 283, 286.

Defendant also urges in this aspect of the case that no instruction was given to the jury regarding the issues in the crime

of voluntary manslaughter under circumstances constituting unreasonable self-defense. Defendant's Instruction No. 21 (based upon IPI-Criminal No. 7.06) on this subject was refused by the court. The court did instruct the jury at defendant's request as to the issues of voluntary manslaughter under circumstances involving provocation. Defendant's given Instruction No. 18, IPI-Criminal 7.04. This point might have significance if defendant had been convicted of murder. However, since the jury returned a verdict of guilty of voluntary manslaughter, the omission of defendant's tendered instruction was patently harmless. Also, as above pointed out, defendant objected to State's given Instruction No. 11 (IPI-Criminal 24.06) on justifiable force. This places defendant in an inconsistent posture. Furthermore, this defendant's refused Instruction No. 21 did not follow IPI-Criminal No. 7.06 but modified it by adding a requirement that to sustain the charge of voluntary manslaughter the State was obliged to prove "that the defendant did not act under compulsion." Thus, the tendered instruction was manifestly erroneous and it was properly refused.

The third point raised by defendant is that the court erred in instructing the jury as to the crime of voluntary manslaughter when there was no evidence in that regard. This contention is a repetition of the argument previously advanced. It has already been adequately considered and rejected. Upon examining the instructions in the light of all of the evidence, we conclude that the jury was properly instructed and we find no error.

Defendant's next contention raises a totally different question. Bruce Drennan, who participated with deceased in pursuit of defendant, was called as a witness by the People. An officer named Heinz Betz had interviewed Drennan and made a written report. This document was made available to defense counsel. The defense was desirous of interviewing the officer and request-

ed his home address. Apparently, at the time of trial, the officer was excused from duty on some type of sick leave.

The fact that the defense had obtained a copy of the officer's written report serves completely to differentiate the authorities cited by defendant. In People v. Cole, 30 Ill 2d 375 and in People v. Moses, 11 Ill 2d 84, the court denied defendant access to the statements. In People v. Cagle, 41 Ill 2d 528, the defendant had obtained the statement but the court refused to permit him to use it for impeachment.

In the case at bar, the record shows that counsel for defendant had in fact obtained the home address of the officer and had sent a process server to his home. Also, the State offered to stipulate to use of the written report of the witness for purposes of impeachment. We find accordingly that defendant's request for the address of the officer was superfluous and that the tendered stipulation was adequate to protect and preserve defendant's right to cross-examination to the fullest extent.

The defendant next urges that the trial court erred in improperly limiting defendant's voir dire examination of prospective jurors. The court directed defendant's counsel to desist from further questions regarding the status of the defendant as a candidate to attend the Military Academy at West Point. The trial court did this on the theory that this line of questioning would be premature because defendant had not actually been admitted to West Point at the time of the occurrence.

The record does not show the precise questions put by counsel for defendant which were found objectionable by the court. The record does show that the court also stated that trial counsel should desist from making statements of fact to prospective jurors in the guise of questions but that the court would permit proper questions to be asked.

Conduct of the voir dire examination must and does rest within the discretion of the trial court. People v. Lexow,

23 Ill 2d 541, 543; People v. Lobb, 17 Ill 2d 287, 300; Jines v. Greyhound Corp., 46 Ill App 2d 364, 376. However, in the case at bar, we find nothing to indicate an abuse of discretion by the trial court. There is no showing that defendant was prejudiced in any manner during selection of the jury. The record does not indicate how many preemptory challenges were used by defendant during the course of selecting the jury. There is no evidence of any kind to indicate any bias or prejudice by any individual juror or by the jurors collectively. On the contrary, the very fact that the jury found defendant not guilty of murder and guilty of voluntary manslaughter would tend to negative the existence of any prejudice by the jury.

When defendant was first introduced to deceased upon entering the party, he said to deceased, "I hate you." This was shown by the People in an apparent attempt to prove malice. In his own testimony, defendant verified the fact that he had used this language. Defendant was then asked directly by his counsel if he hated the deceased. The defendant responded negatively but the court sustained a prompt objection by the State; and, on motion of the State, struck the answer and directed the jury to disregard it. Defendant claims that this ruling impinged upon his right to rebut the evidence of the prosecution.

Apparently defendant wished to prove, by his own testimony, that he used the phrase "I hate you" in a bantering manner. This would seem reasonable in view of the fact that the defendant had never previously met deceased. However, no additional question along these lines was put to the defendant and his counsel did not at any time make such an offer of proof. People v. Hoffie, 354 Ill 123, 140; People v. Nelson, 89 Ill App 2d 84, 90 and People v. Caldwell, 62 Ill App 2d 279, 285. In addition, it is plain that this ruling by the trial court did not prejudice the defendant in any manner as evidenced by the fact that the jury expressly found defendant not guilty of murder. Defendant actual-

ly accomplished the purpose of the stricken testimony. In the opinion of this court, the evidence of guilt was ample beyond a reasonable doubt and the trial was fairly conducted so that defendant was properly found guilty of the crime of voluntary manslaughter.

We now consider defendant's contention that the sentence is excessive. Defendant was sentenced to the Illinois State Penitentiary with the minimum fixed at 5 years and the maximum at 20 years. Defendant has presented us with a lengthy and appealing argument on penology, citing learned Reports and Standards. Defendant also presents statements made in a work by a well known psychiatrist and a report concerning the prison system of Illinois (Menninger's "The Crime of Punishment" and Survey Report on Adult Correctional Facilities and Programs in Illinois, rendered by the John Howard Association). However, our authority in this regard is limited. This court may not, in effect, exercise the function of the trial court and proceed to render a new sentence based upon other or additional evidence or unsupported arguments in mitigation. The rules of the Supreme Court permit this court to "reduce the punishment imposed by the trial court" (43 Ill 2d Rule 615(b)(4)). Under no stretch of the imagination does this rule empower us simply to substitute our judgment for that of the trial judge because criticisms of the present penal system are offered, however eloquent and compelling these arguments may be.

In a number of cases, the Supreme Court and this court have held that before a reviewing court should interfere with the sentence it must be manifest from the record that the term imposed is excessive and not justified by any reasonable view which might be taken of the record. We may exercise this power to reduce the sentence only with considerable caution in a proper case where the penalty constitutes a great departure from the spirit and purpose of fundamental law. People v. Eubank, 46 Ill 2d 383,

394; People v. Taylor, 33 Ill 2d 417, 424; People v. Turner, 129 Ill App 2d 24; People v. Cecil, 128 Ill App 2d 86; People v. Holmes, 127 Ill App 2d 209 and People v. Glasgow, 126 Ill App 2d 82, 90.

With these binding precepts in mind, we must consider that this defendant is a young man without any previous criminal involvement of any kind whatsoever. He was 19 years of age at the time of the occurrence. A number of witnesses testified to his excellent reputation for truth and veracity and for being peaceful and law abiding. The crime for which he was convicted is made probationable by the legislature. We are also keenly aware of the stark and pointless tragedy inflicted upon deceased and his family by the rash and totally unprincipled conduct of defendant. We must consider that a goodly portion of the responsibility, and even of the culpability, must devolve upon thoughtless parents who recklessly permit indiscriminate and unsupervised drinking in their homes by young people who cannot be fully aware of the fatal results which inevitably result from the narcotic effects of alcohol.

With these diverse factors in mind, we must also reflect upon the principles set forth in People v. Lillie, 79 Ill App 2d 174. The court there considered separately the minimum and maximum terms imposed and pointed out the basic purposes sought to be achieved by the imposition of sentence. We agree with the reasoning there established that "adequacy of punishment should determine the minimum sentence, with the maximum dependent upon the court's divination as to the length of time required to achieve rehabilitation." 79 Ill App 2d at page 178. See also People v. Livingston, 117 Ill App 2d 189, 193; People v. Dotson, 111 Ill App 2d 306, 311; People v. Marshall, 96 Ill App 2d 124, 129 and People v. White, 93 Ill App 2d 283, 288.

In our opinion, a sentence of 2 years would constitute an adequate minimum punishment in this case. The minimum sentence

of 5 years imposed by the trial court appears to us as not justified by any reasonable view of the facts and circumstances here. Concerning the maximum, in view of all of the factors here present, with great reliance upon the youth of defendant and his prior good conduct, we have reached the conclusion that the maximum of the sentence should be 10 years. This will provide a proper and effective incentive for early rehabilitation and discharge. People v. Thomas, 127 Ill App 2d 444, 456.

Accordingly the judgment of conviction for voluntary manslaughter is affirmed. The sentence is reduced from a term of from 5 to 20 years to a minimum sentence of 2 years and a maximum of 10 years.

JUDGMENT MODIFIED.

BURKE, P. J. and LYONS, J. concur.

70-128

PEOPLE VS. CLIFTON T. SHINN

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and seventy-one, within and for the Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on SEPTEMBER 27, 1971 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

No. 70-128

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1971.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. CLIFTON T. SHINN, Defendant-Appellant.	Appeal from the Circuit Court of the Ninth Judicial Circuit, Hancock County, Illinois. Honorable John W. Gorby Associate Judge Presiding.

Abstract

ALLOY, P. J.

Defendant Clifton T. Shinn was charged with driving a motor vehicle on August 20, 1969, while under the influence of intoxicating liquor in violation of Section 144, Ch. 95-1/2 of Illinois Revised Statutes.* A jury rendered a verdict of guilty and the court rendered judgment on such verdict.

The facts as they appear in the record indicate that at about 1:10 A. M. on August 20, 1969, defendant was arrested in Hamilton, Illinois, by the marshal of that city. The marshal contended that defendant was driving while under the influence of intoxicating liquor. He immediately read defendant the front side of a card entitled "Miranda Warning" as follows:

"1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one."

* now Ch. 95-1/2 §11-501

Thereafter, the marshal read from the reverse side of the card asking defendant, "Do you understand each of these rights I have explained to you?". Defendant indicated he understood. The marshal then continued, "Having these rights in mind, do you wish to talk to us now?". Defendant said, "Yes". Defendant also said that he would pay a fine.

The marshal then drove defendant to the Hancock County Sheriff's Office in Carthage, Illinois. While they were enroute to Carthage, defendant told the marshal he wanted to call his attorney. The marshal told defendant he could call an attorney when he got to Carthage, but defendant did not make any such call. After they arrived at the sheriff's office in Carthage, defendant, prior to being questioned, said that he was drunk and would pay a fine.

At about 2:00 A.M. defendant was interrogated, at the sheriff's request and at the sheriff's office, by Dr. Coeur, a local physician. Defendant responded to the doctor's questioning by stating where and what he had been drinking and that he was not ill and was not under medication. The doctor told defendant that he was not required to take such test, but requested defendant to take sobriety tests, including a blood test. Defendant declined to take a blood test or any other sobriety test. In the doctor's presence defendant told the marshal that he was drunk.

On appeal in this Court, defendant contends (1) that the trial court erred in denying defendant's pre-trial motion to suppress incriminating statements made by defendant while in custody, (2) in denying his motions for mistrial, (3) in ruling adversely on his objections to the admissibility of the evidence, and (4) that as a matter of law, defendant was not proven guilty beyond a reasonable doubt. Both defendant and plaintiff assert that the major issue was whether there was compliance with the standards

specified in MIRANDA v. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. Defendant contends that the prosecution did not discharge the burden of proof in establishing waiver of right to counsel and the prosecution contends that, in fact, adequate warnings were given defendant and that defendant waived his right to counsel. To determine such issue it is necessary that we review the procedure in this case in the light of the MIRANDA standards.

Before the commencement of the trial, defendant moved to suppress any incriminating statements he had made while in custody. The trial court denied this motion. Defendant again, at the trial, moved to exclude the incriminating statements but the court again denied defendant's request. In determining whether or not the court properly denied such motions, it is necessary that we return again to MIRANDA v. ARIZONA, supra. As has been noted in many cases, MIRANDA detailed a thorough analysis of matters relating to the privilege against self-incrimination involved where there is an in-custody interrogation, and sought to give specific constitutional guidelines for law enforcement agencies and courts to follow. It was pointed out in such case that a prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant, unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. In this connection it was emphasized that procedural safeguards to be employed in custodial interrogation must include fully effective means to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it.

The court in MIRANDA v. ARIZONA, supra, specifically discussed the procedural safeguards, and after emphasizing that custodial interrogation

involved possible deprivation of the Fifth Amendment privilege, emphasized that this privilege must be insured. It was pointed out specifically that an accused has a right to counsel and that there must be clear evidence that the accused waived his right to remain silent, and it must also be shown that he specifically waived his right to counsel.

The court pointed out that an individual need not make a pre-interrogation request for an attorney, and that, while such request affirmatively secures his right to have one, his failure to ask for an attorney does not constitute a waiver. In the cause before us, on the record, a specific request for counsel was made and there is nothing in the record to show an effective waiver of the right to counsel. The court in MIRANDA pointed out that if an individual states that he wants an attorney, the interrogation must cease until an attorney is present. It was also pointed out that if the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the prosecution to demonstrate that defendant knowingly and intelligently waived his privilege against self-incrimination, and his right to retained or appointed counsel, and to the presence of counsel at the time of the taking of any such statement. A valid waiver could not be presumed simply from silence of the accused after warnings are given, or simply from the circumstance that a confession was in fact eventually obtained.

The Miranda warning card which was read to defendant in the cause before us did not contain any question to which defendant directly could have responded by making a specific waiver as to his right to counsel. Nor could defendant's reply be construed as a waiver of the right to have counsel present at any interrogation subsequent to the request for counsel. There is nothing in the record to show that defendant made any such

specific waiver, and the response to the question, "Do you wish to talk to us now?", with the response, "Yes", did not, in our judgment, constitute a waiver on the part of defendant. It was merely an agreement to speak and to waive silence. The Supreme Court of the United States was aware that the presence of counsel would enhance the probability that an individual's right to choose between silence and speech would remain unfettered through the interrogation process. The court recognized also that the right to silence would have very little substance if the right to counsel, which the court found was necessary to effective use of the right to silence, was deemed to be waived by implication.

Although in the record before us it is not indicated that defendant availed himself of the opportunity to phone whomever he wished, that opportunity seems to have been given him following the interrogation by the doctor acting for the sheriff in the cause before us. The incriminating statements of defendant stemming from the custodial interrogation should have been suppressed. On the basis of the record, therefore, it is apparent that the trial court improperly denied defendant's pre-trial motions to suppress the evidence and for mistrial as a consequence of the introduction of such evidence.

An additional issue was involved in the motion for mistrial. Defendant had moved to exclude all evidence concerning defendant's failure to take a blood test. The court granted such motion, pursuant to the provisions of Section 144, Ch. 95-1/2 of Illinois Revised Statutes. This Section expressly prohibits introduction of evidence of a refusal to submit to a chemical test under a related Section. In spite of the ruling on such motion, the marshal and the interrogating doctor called by the sheriff, mentioned before the jury, without specifying particularly the nature of the items referred to,

that an "examination", "test", "sobriety test", or "sobriety examination", were offered to and refused by the defendant. The defendant protested repeatedly against the admission of such testimony. Some of the testimony was stricken and the jury was asked to disregard it. The defendant's request for a mistrial was denied by the court. Certainly, in referring generally to a sobriety examination or other nonspecified tests, rather than specifically to particular non-chemical tests such as walking or picking up coins, the prosecution necessarily planted in the jury's mind, in a manner which could not be eradicated by the court's direction, that defendant had been offered a chemical or blood test and had refused to take it. This procedure was erroneous and violative of the provisions of Section 144, Ch. 95-1/2 of Illinois Revised Statutes. The motion for mistrial should have been granted.

On the basis of the record, therefore, we must conclude that the trial court incorrectly denied defendant's motion to suppress the evidence involving the admissions made while in custody, and, also, in failing to grant defendant's motion for a mistrial. Defendant also contends that the evidence failed to prove defendant guilty beyond a reasonable doubt and that, therefore, the guilty verdict could not stand. On examination of the record, however, we believe that sufficient evidence was produced, which was competent, which might have justified the jury in finding defendant guilty, were it not for the erroneous evidence introduced as indicated in this opinion. We do not believe it is necessary to discuss such evidence in detail but we have referred to it in the statement of fact.

For the reasons stated, therefore, the judgment of the Circuit Court in this cause is reversed and the cause is remanded for new trial, consistent with the views expressed in this opinion.

Reversed and Remanded with Directions.

Stouder, J. and Scott, J. concur.

70-120

PEOPLE VS. ALLAN B. STEVENS

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and seventy-one, within and for the Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on SEPTEMBER 28, 1971 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Case No. 70-120

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1971

People of the State of Illinois,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Whiteside County
	)	
vs.	)	
	)	Honorable
Allan B. Stevens,	)	John L. Poole
	)	Presiding Judge
Defendant-Appellant.	)	

PER CURIAM

Abstract

On December 8, 1969, Defendant-Appellant, Allan B. Stevens, was indicted for the offense of armed robbery by the Grand Jury of Whiteside County. On January 19, 1970, defendant appeared in open court with his counsel, was granted leave to withdraw his pleas of not guilty and thereafter entered a plea of guilty for which sentence of from five to twenty years in the Illinois penitentiary was imposed.

The Illinois Defender Project was appointed to represent defendant on his appeal in this court and has moved to withdraw as counsel for the reason that after extensive consideration of the proceedings they are of the opinion that there is no error in such proceedings sufficient to raise any issue on appeal. Accompanying said motion to withdraw as counsel is a memorandum filed in accord with Anders v. California, 388 U.S. 738.

It appears that the Grand Jury was duly impaneled, the indictment properly charges the commission of an offense, the defendant was duly represented by counsel and was extensively advised of his rights, the nature of the offense charged and the penalities therefore by the trial court. Defendant filed a written waiver of jury and plea of guilty. Judgment of conviction for the

offense was entered and no irregularities affect the propriety of the defendant's conviction.

Likewise there do not appear to be any irregularities regarding defendant's sentence of from five to twenty years in the penitentiary. Defendant had a prior record of conviction for armed robbery for which he had been sentenced to a term of from two to ten years in the penitentiary and at about the time of conviction in this case defendant was also sentenced to a twenty-five year term for the conviction of a felony in Iowa to be served consecutively with the conviction in the present case. Under such circumstances no question exist concerning the propriety of the sentence imposed.

For the foregoing reasons the Illinois Defender Project is granted leave to withdraw as counsel on appeal for said defendant and the judgment of the Circuit Court of Whiteside County is affirmed.

JUDGMENT AFFIRMED

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